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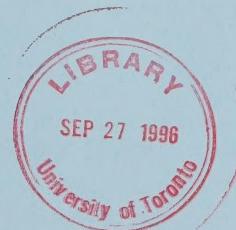
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BP-413E

COPYRIGHT REFORM

Monique Hébert
Law and Government Division

March 1996



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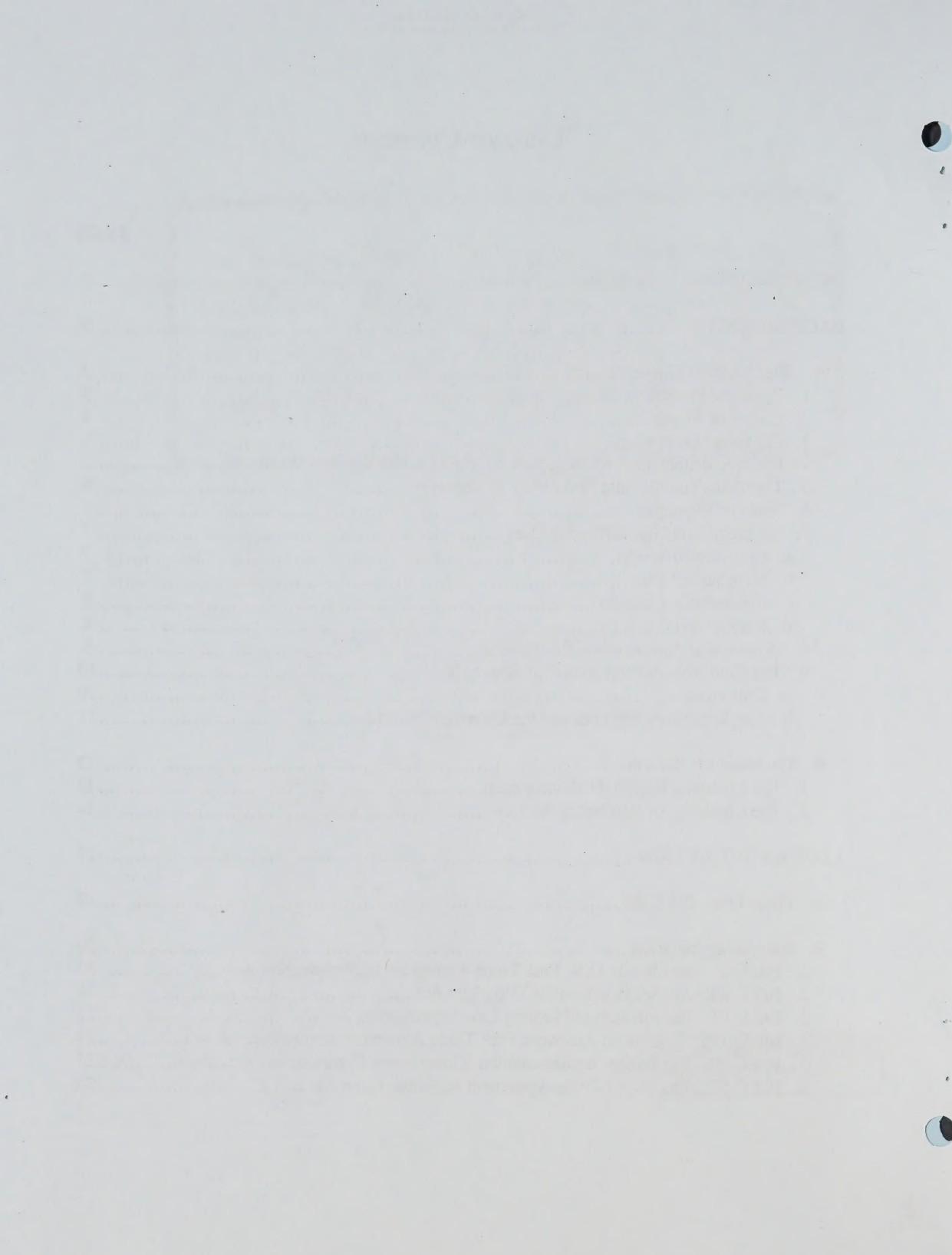
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Available in Canada through
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Canada Communication Group -- Publishing
Ottawa, Canada K1A 0S9

Catalogue No. YM32-2/413E
ISBN 0-660-16567-8

CE DOCUMENT EST AUSSI
PUBLIÉ EN FRANÇAIS

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COPYRIGHT REFORM

INTRODUCTION

When Parliament passed the *Copyright Act* in 1921, radio broadcasting and cinematography were still in their infancy; things like television, photocopiers, VCRs, computers, fax machines, transmission by satellite and the Information Highway could hardly have been imagined at the time. Yet these and other technological innovations have since invaded the marketplace and, while they have radically altered the ways by which copyright material can be created, disseminated and utilized by the public, they have also wreaked considerable havoc on the ability of copyright owners to exercise effective control over the use of their material and to get a fair return on their investment.

That the age-old legislation was in need of revision in order to attune it to the changing times and technologies became a matter of increasing urgency over the years. It was not until 1987, however, that legislative action was finally taken. Bill C-60, An Act to amend the Copyright Act and to amend other acts in consequence thereof, was tabled in Parliament that year and was passed into law the next.

Although a long-awaited piece of legislation, Bill C-60 proved to be a disappointment for many within the copyright community because it effected a partial reform only, and not a complete overhaul of the law. The government decided at the time to make the needed changes in two separate phases. Bill C-60 comprised the first phase of the planned revisions; "phase two" would handle the remaining changes.

Initially promised for the fall of 1988, the phase two amendments are still outstanding. In the interim, however, a considerable amount of legislative activity has taken place. Five bills amending the *Copyright Act* in one or more material respects have been passed since Bill C-60 was enacted, three of which were mandated by Canada's obligations under the various international trade agreements that were recently concluded or revised.

This legislative activity notwithstanding, a number of important and potentially divisive issues remain to be dealt with under phase two.

The government indicated in the Speech from the Throne of 27 February 1996 that it would introduce proposals to strengthen the economic framework with legislative improvements in the copyright area. Whether this signals the tabling of the phase two amendments is open to question. As the remaining changes have been promised for over five years, however, it is hoped that the next bill will be comprehensive in scope.

Given the pending legislation, this paper attempts to explain how copyright works. Especially since the emergence of the new communication technologies, copyright is a field that has become increasingly complex and difficult to understand; an overview of the basic features of copyright law would therefore seem in order. A summary of the more important changes that were made under Bill C-60 and subsequent legislation will then be provided to place the forthcoming revisions in context. Finally, selected areas of copyright reform will be discussed. The creation of "neighbouring rights," which may prove to be one of the more contentious issues on the legislative agenda, will first be examined. Possible changes to the fair dealing exemption and the exemptions for the educational sector will then be considered.

BACKGROUND

Copyright applies to works of creative endeavour, notably in the field of arts and letters, as those terms are understood in the broad sense. It consists of granting to the creators of protected subject matter, or other rightful copyright owners, a number of exclusive rights in relation to their works, thereby enabling them to control and exploit their works more fully.

In the common law jurisdictions, the statutory genesis for this branch of the law on intellectual property can be traced back to England's Statute of Anne, which was passed in 1709. Under this seminal enactment, authors were given the exclusive right to make printed copies of their books. Prior to this time, the right to generate copies had belonged to the book's printer and then to the bookseller, who subsequently owned the book for resale.

From this initial concern to promote and reward authorship by conferring a copyright on the actual creator of the work, the law of copyright has grown exponentially. Today, copyright extends to a broad spectrum of works, not just the written word. The rights reserved exclusively to authors and other creators have also been expanded to cover additional applications besides the making of printed copies.

It should be noted that the copyright laws enacted around the world may differ markedly from one jurisdiction to the next. Some countries have favoured strong copyright protection for creators, whereas others have been more guarded in the protection afforded. In relative terms, Canada's copyright legislation would seem to sit somewhere in the middle, neither among the stronger copyright regimes, nor among the weaker. With this in mind, the current provisions of Canada's copyright legislation will now be outlined.

A. The Canadian *Copyright Act*

1. Protected Works

Section 5 of the *Copyright Act* (hereinafter the Act) provides that copyright "shall subsist... in every original literary, dramatic, musical or artistic work." These four basic categories of protected subject matter encompass a wide variety of works. Some of these works are expressly mentioned in the Act, such as books, sheet music, maps, paintings, sculptures, photographs, choreographic works, and woodcuts. Works that are not expressly mentioned may still qualify for protection if they are found to come within one of the four basic categories. Computer programs are a case in point. Before being granted express statutory protection under Bill C-60 in 1988, computer programs had been held by the courts to be a form of "literary work" and, hence, were eligible subject matter.

In addition to being eligible in terms of subject matter, a work must also satisfy the nationality criteria in order to qualify for copyright protection in Canada. Pursuant to these

criteria, which are also set out under section 5, the work must either have been created by a national or a resident of a prescribed country, or the work must first have been published in a prescribed country.

Provided the eligibility and nationality requirements are met, copyright vests automatically in the work, whether it is published or not. Furthermore, although the Act makes provision for the registration of works with the Copyright Office, registration is not a prerequisite to protection. It could, however, be of benefit in cases where copyright ownership was in dispute (section 54 *et seq.*).

2. Exclusive Rights

The rights reserved exclusively to the copyright owner under the Act are at the heart of copyright, for it is by virtue of these rights that copyright owners are able to determine the particular ways in which their works may be utilized by them and by others.

The rights conferred under the Act are of two types. First are the "moral rights," which enable creators to protect their reputation and safeguard the integrity of their works. Creators cannot transfer their moral rights to another party, but they may waive them (sections 14.1 and 14.2).

The second type of rights, known as the "economic" or "pecuniary" rights," enable copyright owners to determine how their works may be used and to share in the benefits produced by such uses. Chief among the economic rights are the copyright owners' exclusive right to do the following acts in relation to their works, or to authorize others to do the same: a) publish the work; b) reproduce the work or any substantial part thereof; c) perform the work or any substantial part thereof in public; and d) communicate the work to the public by telecommunication. Various other rights are also prescribed, such as the exclusive right to translate the work, to convert a work into a different medium (e.g., turning a novel into a film) and to exhibit certain types of artistic works in public. The economic or pecuniary rights are set out at section 3 of the Act and, unlike the moral rights, they may be transferred to another party either by assignment or grant of licence (section 13(4) and 14).

3. Copyright Ownership

As a rule, first copyright in Canada vests in the work's author or creator (section 13(1)). There are several exceptions to this rule, the most important of which concerns works created in the course of employment. In such situations, the employer rather than the creator/employee will usually own first copyright, unless an agreement has been reached to the contrary (section 13(3)). A further exception concerns engravings, photographs and portraits. Where such works were commissioned for valuable consideration, first copyright will vest in the person who commissioned the work and not its creator (section 13(2)). Finally, the copyright in works prepared by or published under the direction or control of Her Majesty vests in the Crown, unless there is an agreement to the contrary (section 12).

4. Multiple Authorship and Multiple Copyrights in Relation to a Work

A related issue to that of first copyright ownership is the issue of multiple authorship and multiple copyrights. In this regard, the Act makes provision for works of "joint authorship," which are defined as works produced by the collaboration of two or more authors in which the contribution of one is not distinct from the contribution of the other author or authors (section 2). With such works, there might be as many copyright owners as there were collaborators on the work, each of whom would have a share in the copyright vesting in the work.

The Act also refers to "collective works," which are defined as: an encyclopedia, dictionary, year book or similar work; a newspaper, review, magazine or similar periodical; and any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated (section 2). With this type of work, there may be separate copyrights and related copyright owner(s) for each of the work's component parts, as well as the copyright that would subsist in the collective work as a whole.

A further type of work recognized under the Act is the "compilation," which was added in 1994 under Bill C-115, the NAFTA implementation legislation. This type of work encompasses a work resulting from the selection or arrangement of data, or a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof. As with collective works, it is assumed that compilations could comprise separate copyrights and

copyright owners for each work it included, as well as a separate copyright and copyright owner(s) for the compilation as a whole.

A sound recording provides a good example of the multiple copyrights that might subsist in a work. With this type of work, there could be up to three distinct copyrights: the copyright that subsists in the musical composition; the copyright that subsists in the separately-written lyrics; and the copyright that subsists in the sound recording itself, since under the Act sound recordings are protected separately from the works they embody. With this type of work, therefore, there could be several distinct copyrights and, hence, several distinct copyright owners.

5. The Transferability and Divisibility of Copyright

Copyright may be transferred by written instrument or by testamentary disposition (sections 13 and 14). It is also divisible by rights, by time and by territory, such that a copyright transfer may involve the full copyright or simply a part of it (section 13(4)). For example, a Canadian novelist may assign the "reproduction right" in relation to his or her novel (divisibility by rights) to a European publisher for the purposes of printing and marketing the novel in Europe (divisibility by territory) for a period of 10 years (divisibility by time), thereby retaining for him or herself all of the other copyright components (e.g., printing and marketing in all non-European markets, world-wide translation and film rights, etc.).

Since copyright may be transferred and divided, the current copyright owner or owners may be entirely different persons from those who created the work in the first place or who were vested with first copyright ownership under the Act.

6. Term of Protection

The usual term during which copyright subsists in an eligible work is the life of the creator, plus 50 years following the end of the calendar year in which he or she died (the "life plus 50" rule). In the case of works of joint authorship, the year of death of the last surviving author is the date upon which the "life plus 50" rule is calculated. Shorter terms, however, have been prescribed for selected categories of works, such as the straight 50-year term that applies to photographs and sound recordings from the date of their making (sections 6 to 12). Finally, moral rights run for the same term of protection as copyright (section 14.2). Once the prescribed term has

expired, the statutory protection ceases and the work falls into the public domain, where it may be used freely without fear of infringement.

Determining whether a work has fallen into the public domain may not always be a simple matter, however, specially where the "life plus 50" rule applies. As discussed above, some works, like works of joint authorship, may have two or more creators; other works, like collective or composite works, may have one or more separate copyrights and related copyright owners. Consequently, with such works, it would be necessary to ascertain how many copyrights and related copyright owners were involved before the copyright expiry date could be calculated.

7. Infringing and Non-Infringing Uses

Anyone who uses protected material without first obtaining the copyright owner's consent is at risk of infringing copyright. Not all unauthorized uses, however, will constitute an infringement. A number of factors may come into play to exonerate the user.

a. Unprotected Works

In order for copyright to be infringed, the work must first be protected by copyright. If the work consists of ineligible subject matter, or if it does not satisfy the nationality criteria respecting authorship of the work or place of first publication, the work will not be copyright in Canada and will thus not give rise to a claim of infringement. Similarly, there can be no infringement if the work in question is no longer copyright. As mentioned above, copyright subsists only for a prescribed term. Once this term has run its course, the work falls into the public domain, where it may be used freely without fear of infringement.

b. Unprotected Uses

Only those uses that actually run counter to one or more of the copyright owner's exclusive rights can give rise to an infringement. If the protected material is used in any other way, there can be no infringement, as copyright does not come into play in such cases. Libraries, for example, are free to "lend" their works to the public without fear of infringement, for, at present, "public lending" is not a protected use under the Act.

c. Compulsory Licences

Copyright will not be infringed if the activity in question is otherwise permitted by compulsory licence. In past years, a number of compulsory licences were prescribed under the Act, most of which dealt with books and serial publications. All pre-existing compulsory licences have been repealed since 1988, however, and two new ones have been created. The new compulsory licences enable the following activities to be carried out upon fulfilment of the prescribed conditions:

- in cases where the copyright owner of a published work cannot be located, permission to use the protected material may be obtained from the Copyright Board which, if satisfied that reasonable steps have been taken to locate the copyright owner, may issue a licence to the applicant to use the protected material under such terms and conditions as the Board establishes (section 70.7); and
- upon payment of the prescribed tariff, a work may be communicated to the public by means of telecommunication where the communication involves the retransmission of a distant signal (section 28.01).

d. Exemptions

The last instance where copyright will not be infringed is where a given activity is exempted under the Act or, more accurately, is "deemed" not to constitute an infringement.

There are over a dozen specific statutory exemptions, most of which are set out under section 27. On balance, these exemptions are narrow in scope and would not excuse many practices that are now commonplace, such as taping a television program in order to view it at a more convenient time or photocopying a magazine article in order to give it to a friend.

In addition to the specific exemptions, the Act also permits a "fair dealing" with a work for the purposes of "private study, research, criticism, review or newspaper summary" (section 27(2)(a)). In contrast to most of the other measures, the fair dealing exemption is of general application, that is, it applies to all, not just specific, copyright material; however, it can be

invoked only in relation to one of the listed purposes and none other. Furthermore, the dealing in question must be a "fair" one - a requirement that has so far been construed strictly by the courts.

8. Remedies and Importation Restrictions

Every one who uses protected material in contravention of the Act commits an infringement and, depending on the nature of the transgression, he or she may have to answer for it either civilly or criminally or both.

Criminal sanctions are usually reserved for "commercial piracies," that is, deliberate infringements for trade purposes. In criminal cases, the punishment on summary conviction is a fine of up to \$25,000 or imprisonment for up to six months, or both; conviction on indictment carries a maximum fine of \$1 million or imprisonment for five years, or both (section 42).

Where civil proceedings are taken, various remedies are available, including an injunction, compensatory and punitive damages, an account of profits and the legal costs of the suit (sections 34 to 40). There is a three-year limitation period on civil actions (section 41).

In addition to the foregoing remedies, copyright owners are also able to stop foreign-made copies of their works from entering Canada under certain circumstances. These "borders measures" apply both to copies of works that were made illegally abroad (i.e., "pirated" copies made without lawful authorization), and to copies that were made legally abroad (i.e., with the copyright owner's consent), but whose importation into Canada is otherwise proscribed under the Act.

As mentioned earlier, copyright is divisible by rights, by time and by territory. Where a territorial division has been made, the Act deems the competing foreign edition, though legally made in the foreign jurisdiction, to be an "infringing" copy, if it is imported into Canada without lawful authorization (sections 2 and 27(4)). Under sections 44, 44.1 and 45, the copyright owner (or licensee in some instances) is empowered to bar entry to such copies and, in doing so, may enlist assistance from Canada Customs. Several exceptions, however, are prescribed under section 45. Notably, the Canadian and provincial governments are not subject to the importation restrictions. Libraries and "institutions of learning" are also exempted, if the work they wish to import has not yet been printed or made in Canada. Individuals are also free to import up to two

copies of a work, but only if the work is for their personal use and was published in a "treaty country," as that term is defined. It is also lawful to import into Canada a foreign edition of any book by a Canadian author that has been lawfully printed in a treaty country.

Finally, additional border measures were recently enacted that enable the copyright owner or exclusive licensee to apply to the court for a restraining order under specified circumstances to prevent the importation of a competing version of a work. Where such an order had been made and subject to any provision to the contrary under the court order or other Canadian law, Customs officials could impound the works in question. The impounded works, however, could be detained for only two weeks following notice of the detention to the applicant, unless, within this period of time, the applicant commenced proceedings in court for a final determination. (section 44.1)

9. The Collective Administration of Copyright

a. Collectives

Especially since the emergence of modern reproduction and communication technologies, copyright owners have become increasingly hardpressed to exercise effective control over their works. Clearly, authors cannot stand guard over every photocopying machine to ensure that their books and articles are not being systematically "ripped off." Nor can songwriters hope to tune in to every radio station to ensure that their music is not being "illicitly" broadcast.

In answer to the near impossible task of enforcing their rights on an individual basis, copyright owners decided to join forces in order to administer their rights collectively through the agency of bodies commonly known as "collective societies" or simply "collectives." Canada's first collective was the (former) Canadian Performing Right Society Ltd., which was established in 1925 to administer the "performing rights" in relation to musical works. Other collectives have since been formed to administer other areas of copyright activity.

In general terms, the collectives operate in the following manner: on behalf of their members, the copyright owners, they authorize third party users, by licence or other instrument, to utilize the protected material in their repertoire, in exchange for the prescribed fee and subject to such terms and conditions have been agreed upon. After deducting their operating costs, the collectives then distribute the proceeds to the appropriate copyright owners. In some cases,

collectives may also be responsible for enforcing, by civil action or criminal complaint, the copyright right or rights that they administer.

The mandate of a collective may be international in scope. Such can be the case where collectives operating in the same field, but in different jurisdictions, sign reciprocal agreements to administer each other's repertoires and exchange the concomitant royalties. With international cooperation of this kind, copyright owners are thus spared the hardship of having to sign up with a collective on a country-by-country basis. The users also benefit in that the number of collectives they might have to deal with in order to obtain copyright clearances is commensurately reduced.

b. The Regulatory Regimes and the Copyright Board

Following the establishment of the Canadian Performing Right Society Ltd. in 1925, concerns arose that this collective, which was the only one operating in its field at the time in Canada, might adversely affect the availability of music in Canada, either by unduly withholding the granting of licences or by charging excessive fees for the licences it was prepared to issue.

In response to these concerns, the federal government appointed a Royal Commission in 1935 to look into the matter.⁽¹⁾ Following the Commission's recommendations, the Act was amended in 1936 to provide for the establishment of a regulatory body, the "Copyright Appeal Board," whose sole function would be to review and approve the rates that this collective, or any future rival collective, could charge music users.

The regulatory regime for the "performing rights societies" remained largely unchanged for 50 years. Under Bill C-60, however, several minor changes were introduced. A second regime was also put in place for the benefit of other collectives that might be established to administer other areas of copyright activity. Termed "licensing bodies" under the Act, these collectives were also made subject to the jurisdiction of the Copyright Appeal Board, which was renamed the "Copyright Board" under the bill. In the case of licensing bodies, however, the Board's rate-setting function could be by "invitation only," that is, the Board would have

(1) *Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, Limited, and Similar Societies*, King's Printer, Ottawa, 1935 (the Parker Commission).

jurisdiction to set rates only if the negotiating parties were unable to reach agreement on their own and one of them requested that the Board intervene.

Under further amendments passed in 1988 to implement the Canada-U.S. Free Trade Agreement (Bill C-2), a third regime was established to regulate the rates that could be charged by the collectives that would be formed to administer the newly-created "retransmission right" (i.e., part of the right to communicate works by telecommunication). Termed "collecting body" under the legislation, this type of collective was made subject to a regime similar to that in place for the performing rights societies; that is, the collecting body would have to submit, on a regular basis, a statement of proposed rates for the Board's prior approval.

At present, there are therefore three separate regulatory regimes for collectives under the Act: (1) the regime that applies to the performing rights societies, which administer the performing right and part of the telecommunications right as regards musical works only (sections 67 to 69); (2) the regime that applies to collecting bodies, which administer the retransmission right (sections 70.61 and 70.67); and (3) the regime that applies to licensing bodies, which administer any of the other copyright rights not governed by the foregoing regimes (sections 70.1 to 70.6).

B. The Need for Reform

1. The Changing Copyright Environment

With the invention by Gutenberg of the printing press in the 15th century, written materials could suddenly be duplicated with unprecedented ease and speed; no longer was it necessary to transcribe these works painstakingly by hand. In the centuries that followed, this ingenious innovation has been matched time and again in other fields of endeavour. Today, the air waves are cluttered with signals that bring protected material direct to consumers. Consumers, moreover, are now able to make their own copies of the broadcast programming by simply pushing a few buttons on their audiotape decks and VCRs. In some cases, it can be cheaper and faster to photocopy an entire book than to purchase it through normal channels. With some types of works, the computer, assisted by the person sitting at the keyboard, is proving to be the author of the

work. In fact, for some artists, the interactive computer technologies have become the predominant medium for creative expression.

These and countless other activities come within the purview of copyright law. It is not surprising, therefore, that Canada's copyright legislation - which was drawn up years before the radio became a standard feature in the home - has been hardpressed to cope with the technological innovations that have, since the turn of the century, revolutionized the world in which we live.

Many industrialized nations modernized their laws in order to adapt them to the rapidly changing copyright environment. Countries like Australia, France, Great Britain and the United States, for example, have overhauled their legislation at least once in recent decades. Some of these jurisdictions have even completed a second and third round of revisions.

Canada, in contrast, has been slow to respond. Its first major update was effected only in 1988 with the passage of Bill C-60. As noted earlier, however, this bill represented only the first phase of a larger reform package that the government planned to introduce.

Despite the relatively limited legislative action that has been taken in this country, copyright reform has nonetheless attracted considerable attention. An impressive number of studies and reports were issued over the years, beginning with the Ilesley Royal Commission's Report on Copyright, which was issued in 1957. Other noteworthy studies include the Economic Council of Canada's 1971 *Report on Intellectual and Industrial Property*, and the Department of Consumer and Corporate Affairs 1977 study *Copyright in Canada, Proposals for a Revision of the Law* (the Keyes/Brunet study). During the 1980-1984 period, this Department also released over a dozen separate studies on particular aspects of copyright reform, such as home-taping, photocopying, performers' performances and Crown copyright. In addition, recommendations to amend the Act were made in a variety of reports on other subjects, for example, the 1972 report of the (Ontario) Royal Commission on Book Publishing, entitled *Canadian Publishers & Canadian Publishing*, and the 1982 *Report of the Federal Cultural Review Committee* (the Applebaum/Hébert report).⁽²⁾

In the wake of these initiatives, the Liberal government under Mr. Trudeau tabled in May 1984 a white paper on copyright reform, *From Gutenberg to Telidon*. This document was

(2) The full citation for these studies is set out in the bibliography at the end of this paper.

retabled as a discussion paper in January 1985 by the newly elected Conservative government of Mr. Mulroney, which referred it for study to the Sub-Committee on the Revision of Copyright of the House of Commons Standing Committee on Communications and Culture.

The Sub-Committee issued its report *A Charter of Rights for Creators* in October 1985, and the government tabled its response to the Sub-Committee's recommendations in the following February. Some 15 months later, on 27 May 1987, Bill C-60, the first phase of the promised reform, was given first reading in the House of Commons.

2. The Challenge of Reforming the Law

There are two traditional conceptual views of the nature of copyright. The first holds that creators have a natural property right in their works which entitles them as of right to reap the fruits of their labour to the fullest. The second view holds that copyright is no more than a state-created privilege that is granted to creators in the public interest in order to encourage the production and dissemination of socially beneficial works.

In policy terms, these two views can give rise to materially different results. If copyright is viewed as a natural property right, the emphasis will be placed on providing creators with as much statutory exclusivity as is reasonably feasible. Conversely, if copyright is viewed as a state-created privilege, the copyright protection afforded need conceivably go no further than that required to ensure the continued creation and dissemination of works over their non-production or actual suppression.

In practice, policy-makers have not blindly espoused one view at the expense of the other, but have sought to strike a fair balance between the frequently competing interests of the copyright owners, who want meaningful control over their works and the opportunity to make a decent living at their craft, and of the consuming public, which wants ready access to the protected material at the least possible cost. Where the dividing line should be drawn has not been easy to define. Undeniably, however, economic policy has figured prominently in the debate on copyright reform, for copyright bears directly both on the copyright owners' ability to generate income and on the consuming public's liability to pay.

The fact that Canada is a party to the two leading multinational conventions on copyright has given even greater importance to the economic implications of copyright reform.

Canada ratified the 1886 *International Union for the Protection of Literary and Artistic Works* (known as the Berne Convention) and the 1952 *Universal Copyright Convention* (the UCC).

One of the major features of both conventions is the requirement for national treatment. This obliges a member state like Canada to extend to the nationals of the other member states the same protection that it affords its own nationals under domestic law, at least as regards the works covered under the conventions. This obligation applies, moreover, irrespective of whether or not a comparable level of copyright protection has been provided in the other jurisdiction, since material reciprocity cannot be made a condition to the operation of the national treatment rule.

In the context of copyright reform, the implications of the national treatment rule can be significant, particularly for a nation like Canada which has been a net importer of copyright material and which is likely to retain this status in the years to come, given the continuing strong demand in this country for foreign-made works, notably those originating in the U.S.⁽³⁾ Consequently, any move by Parliament to bolster the Canadian copyright industry by enacting stronger copyright legislation would likely add to this country's trade deficit in intellectual property, since, under the national treatment rule, foreign copyright owners would be as entitled as Canadian copyright owners to reap the benefits of the strengthened legislation, including being paid their share of royalties. In some copyright sectors, moreover, royalties paid abroad can represent the lion's share of the royalties collected in Canada.

The fact that strengthening the copyright legislation would likely entail increased capital outflows has, perhaps more than any other factor, caused decision-makers to hesitate to take this course of action and to consider whether implementing programs outside the copyright regime might not be more desirable.

The Public Lending Right program is a good example of an initiative taken outside the copyright regime to assist Canadian writers. Established by the federal government in 1986 to compensate authors for the multiple use of their works in public libraries, this program, which consists of paying a royalty based on use, was restricted to Canadian authors only. If, however,

(3) For an outline of Canada's balance of payments in the copyright sector, see: M. Durand, "The Balance of Trade in Canada's Cultural Industries," *Focus on Culture*, Statistics Canada, Series No. 87-004, Vol. 4, No. 2 (Summer 1992), p. 3-7. A more comprehensive report on this issue is currently being prepared by Statistics Canada and should become available in late March or early April 1996.

the government had decided to create a "public lending right" under the copyright legislation, all eligible authors, and not just the Canadian ones, would have been entitled to benefit, since the national treatment rule precludes discriminatory treatment.

For Canada to place too great an emphasis on its balance sheet when setting copyright policy would likely not sit well with the international community, however. As a party to the international copyright conventions and as one of the wealthier member states, Canada might be criticized by the other nations if, in an effort to protect its balance of payments, it implemented protectionist policies.

Of equal importance, Canada might alienate its creative community, if it rejected strengthened copyright legislation in favour of policies that might be regarded as "fiscally sounder." Indeed, for many creators, copyright is not just a question of dollars and cents and of balance sheets; it is also a matter of principle and social justice that their creative output be fully acknowledged and effectively protected under the law.

Copyright also holds considerable symbolic importance for creators, as a tangible measure of the worth Canadian society attaches to their contribution to the nation's fabric. Thus, the more favourable the copyright environment, the clearer will be the message to creators that their creative activity and cultural pursuits are in fact valued and appreciated, and the greater will be the incentive for them to continue to produce works of benefit to the nation's well-being.

It should be noted, however, that, while there seems to be little doubt that a positive copyright climate can be instrumental in promoting a strong and vibrant cultural industry within Canada, there is some question as to whether strengthening copyright legislation is the option of choice for achieving this end. Copyright is market-oriented; it rewards popular success rather than cultural merit, and although these two attainments are not mutually exclusive, they do not necessarily go hand in glove. In other words, copyright benefits creators whose works are in demand, irrespective of cultural content. Conversely, it may do little for those artists whose cultural contribution is significant but whose works simply don't sell. Given the reality of the marketplace and the fact that strengthened copyright legislation could increase Canada's trade deficit in cultural material, some analysts have argued that, from a cost/benefit perspective, it would be preferable to implement programs outside the copyright regime in an effort to bolster Canada's cultural industries.

As may be seen from the foregoing, revising the copyright legislation is no easy undertaking. Many competing factors and interests must be weighed in the balance and, while it is important for Canada to take pride in, and stand behind, its creative community, it is also important that all available options be carefully assessed before action is taken. Whether strengthening the copyright legislation is the best solution, or even a good solution, is something the decision-makers have to consider in setting copyright policy.

LEGISLATIVE ACTION

A. Phase One: Bill C-60

The tabling of Bill C-60 in May 1987 launched the first phase of copyright reform. Characterized as a "pro-creator" initiative by its sponsor, the Honourable Flora MacDonald, former Minister of Communications, this bill effected a number of important changes, including the following:

- it provided explicit statutory protection for computer programs;
- it broadened the definition of "choreographic works" and recognized them as a distinct category of eligible subject matter;
- it created a public exhibition right for certain types of artistic works;
- it expanded and strengthened the moral rights of creators;
- it abolished the controversial compulsory licence for sound recordings;
- it clarified the relationship between copyright and industrial design;

- it provided the statutory foundation for the collective exercise of copyright by licensing bodies and set up a distinct regulatory regime that would apply to them;
- it restructured the Copyright Appeal Board, renamed it the Copyright Board and revised its mandate;
- it introduced a compulsory licence mechanism for unlocatable copyright owners; and
- it increased significantly the penalties for infringement.

Bill C-60 was supposed to be a non-controversial proposal. In fact, the government expected that the bill would be given expeditious passage by Parliament, but such proved not to be the case. The bill was highly contentious, and it took over a year to become law.

A predictable criticism concerned the government's decision to split the review process in two. Creators were deeply disappointed with this approach, since it meant they would have to wait even longer for the promised changes. This criticism aside, however, the creative community was generally supportive of the bill once it had been amended in committee, although some creator group still argued that several of the bill's provisions did not go far enough in promoting and protecting their interests.

User groups, in turn, felt that the bill was too creator-oriented and that a more equitable balance had to be struck between creators and themselves. Two measures in particular were of concern to them. First, the museum community widely opposed the creation of a public exhibition right for certain types of artistic works. Since this right would entitle copyright owners to both control and be compensated for the exhibition of their works in public, it was feared that curatorial freedom might thereby be undermined and that already-tight operating budgets would be further strained.

The second area of concern was in relation to the provisions respecting licensing bodies. As discussed earlier, Bill C-60 set the statutory foundation for the collective exercise of copyright by "licensing bodies," that is, the collectives that would be responsible for administering

all other areas of copyright activity, except the performing rights for musical works (and the retransmission right that was later created under Bill C-2).

The main concern with the licensing body provisions was more one of timing than of substance. A number of user groups, primarily from the education and library sectors, felt that it would be unfair if the measures respecting licensing bodies were enacted before the copyright exemptions were revised. Arguing that they would be at a disadvantage in negotiating with the licensing bodies if they did not know what exemptions were in store for them, these groups urged that the licensing body measures be withdrawn for the time being and reintroduced along with the revised exemptions under phase two.

These concerns were not remedied by the House of Commons, which passed the bill on 3 February 1988; however, they became a stumbling block in the Senate. Acting on the recommendations of the Senate Committee on Banking, Trade and Commerce, the committee that studied the proposed legislation, the Senate passed the bill on 3 May, but with two amendments.

The first amendment simply eliminated the controversial public exhibition right for certain artistic works. The second amendment postponed for one year the coming into force of the measures respecting licensing bodies. This delay was imposed in order to give the government sufficient time within which to table the proposed copyright exemptions, thus ensuring a "level playing field" in the negotiations between the licensing bodies and the education and library sectors.

The House of Commons considered the bill, as amended by the Senate, on 17 May 1988. Although several Members raised concerns, primarily about the timing of phase two, the House of Commons reiterated its support for the proposed legislation without the Senate amendments, and referred it back to the Upper Chamber for further consideration.

Reappearing before the Senate Committee on Banking, Trade and Commerce on 27 May 1988, the Minister of Communications was able to satisfy the Committee members that most of the outstanding concerns under the bill would likely be resolved shortly. She noted that the consultative committees that had been established to deal with the exemptions for schools and libraries were making significant progress. She also undertook to initiate consultations between curators and artists to consider an alternative form of exhibition right that might be more acceptable to both sides and that could be incorporated under phase two, which, the Minister added, would likely be ready for tabling in the fall of that year.

Reassured by the Minister's statements, the Committee reported the bill favourably to the Senate, which withdrew its amendments ("did not insist") on 1 June 1988. Bill C-60 received Royal Assent on 8 June 1988 and by 1 February 1989 all of its provisions had been proclaimed into force.⁽⁴⁾

B. Intervening Initiatives

Although the government had planned to revise the copyright legislation in two stages, it proceeded otherwise. Following Bill C-60, six bills amending the Act in one or more respects were brought before Parliament. Five of these were eventually passed; the sixth was defeated in the Senate. Each of these bills will now be discussed.

1. Bill C-2: The Canada-U.S. Free Trade Agreement Implementation Act

The fact that Canadian cable operators were capturing American broadcast signals and channelling them by cable to their subscribers, but without paying any form of compensation to the American program and film producers, had been a long-standing irritant in the U.S. The Canada-U.S. Free Trade Agreement (the FTA) put a stop to this practice. Under Article 2006 of the FTA, Canada undertook to enact a "retransmission right" under its copyright legislation.

The related copyright amendments were made under Bill C-2, the Canada-United States Free Trade Agreement Implementation Act, which was passed on 30 December 1988.⁽⁵⁾ The predecessor bill, Bill C-130, died on the Order Paper when general elections were called in the fall of 1988 due to the deadlock in the Senate over the free trade legislation.

Bill C-2 created a retransmission right by replacing the narrower "radio communication right" under section 3(1)(f) of the Act with a more comprehensive "telecommunication" right that would cover all modes of telecommunication, not just those effected by means of Hertzian (radio) waves, as had hitherto been the case. Concomitantly, the bill set up a form of compulsory licence that would exempt from liability the retransmitters of long-distance signals who paid the prescribed royalty fees (section 28.01). Related amendments were also made

(4) *Statutes of Canada* 1988, chap. 15.

(5) *Statutes of Canada* 1988, chap. 65.

respecting "collecting bodies," that is, the collectives that would be responsible for administering the new retransmission right. Finally, the Copyright Board's mandate was expanded to regulate the rates that these collecting bodies could charge for the retransmissions in question (sections 70.61 to 70.67).

There was little discussion on the creation of the retransmission right when the bill was before Parliament, as other aspects of the free trade implementation legislation predominated. Had such amendments formed part of a copyright bill, however, they might have generated considerable controversy, for the creation of a retransmission right was among the most contentious issues that the Sub-Committee on the Revision of Copyright had considered during its 1985 hearings. Although the Sub-Committee came down in favour of creating such a right, its recommendation was not unanimous. One member dissented, primarily on the ground that, due to the application of the national treatment rule, this right would entail a material outflow of funds "overwhelmingly to the United States."

2. Bill C-88: An Act to amend the Copyright Act

Until recently, two collectives administered the performing rights in relation to musical works in Canada: the Composers, Authors and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PRO CAN). These collectives have since merged and are now operating under the name the Society of Composers, Authors and Music Publishers (SOCAN).

Following the enactment of the "telecommunication right" under Bill C-2 in 1988, CAPAC and PRO CAN filed their respective statement of royalties with the Copyright Board, setting out the tariffs they proposed to charge the various categories of music users, including the new users who had become liable under the recently enacted "telecommunication right." The particular wording of some of the Act's provisions, however, led to some question as to whether two categories of users, namely networks like the CTV Network and the non-broadcast specialty services, like MuchMusic and Super Ecran, were in fact liable under the revised legislation to pay royalties for the music comprised in their programming.

Two separate court actions were commenced to resolve this issue.⁽⁶⁾ While the cases were under appeal before the Federal Court of Appeal, the government decided to bring in remedial legislation that would clearly impose liability on the foregoing users. Bill C-88 was accordingly introduced on 18 June 1992.

The bill's sweep, however, was broader than anticipated. It not only proposed to resolve the problem at hand, it also sought to amend other provisions under the Act that were not directly related to the liability issue under the new "telecommunication right." Most notably, the bill proposed to eliminate the so-called "gramophone" or "jukebox" exemption under section 69, which, for decades, had exempted from liability a wide range of commercial and non-commercial music users who played music in public by means of traditional-style record players, jukeboxes, radio and possibly television sets.

This proposed amendment proved to be so controversial that it became the focal point of debate. Compromise amendments were proposed in committee, but were found equally wanting. In the end, the government resolved the controversy by agreeing to retain the exemption. Once this step had been taken and several technical improvements had been made, the bill garnered widespread support and was eventually adopted, though it was still opposed by the user groups whose liability would be clearly established under the revised legislation.

Bill C-88 was passed by the House of Commons on 18 February 1993. It was later passed by the Senate and given Royal Assent on 6 May 1993.⁽⁷⁾

3. Bill S-17: The Intellectual Property Law Improvement Act

Bill S-17 was given first reading in the Senate on 8 December 1992. This bill was unusual for two reasons. First, it was introduced in the Senate and not the House of Commons. For a government-sponsored bill, such a move is rare, though not unheard of. Second, it represented the first attempt by government to regroup under a single bill all intellectual property

(6) *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1990] 3 F.C. 489, affirmed [1993] 2 F.C. 115 (C.A.), leave to appeal to S.C.C. refused 51 C.P.R. (3d) v (note); and *Canadian Cable Television Assn. v. Canada (Copyright Board)* (1991), 34 C.P.R. (3d) 521, partially affirmed [1993] 2 F.C. 138 (C.A.), leave to appeal to S.C.C. refused 51 C.P.R. (3d) v (note).

(7) *Statutes of Canada* 1993, chap. 23.

law amendments that were not considered controversial and that were therefore likely to be given expeditious passage.

Bill S-17 amended five intellectual property statutes: the *Copyright Act*, the *Industrial Design Act*, the *Integrated Circuit Topography Act*, the *Patent Act* and the *Trade-marks Act*. The copyright amendments were largely limited to modifying the administrative provisions under the Act and were not contentious. For example, the bill modified the nationality criteria under section 5 by automatically extending copyright protection in Canada to the nationals of the countries that adhere to the Universal Copyright Convention of 1952. Prior to this amendment, such protection had been extended by ministerial certificate on a case by case basis. (Note, the nationality criteria were amended further by subsequent legislation)

This bill was passed by the Senate on 3 March 1993 and by the House of Commons on 26 April. It received Royal Assent on 6 May 1993.⁽⁸⁾

4. Bill C-115: the North American Free Trade Agreement Implementation Act

Bill C-115, An Act to implement the North American Free Trade Agreement (hereinafter the NAFTA), was introduced in the House of Commons on 25 February 1993. This bill contained a significant number of changes to the *Copyright Act*, only several of which were specifically mandated under the Agreement. The latter included the creation of a commercial "rental right" for computer programs and sound recordings. The remaining changes were largely made in furtherance of the general obligation under Article 1701 that each Party "provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade." In meeting this obligation, each Party was required, among other things, to give effect to the substantive provisions of the Paris Text of the Berne Convention.

As mentioned earlier, Canada is a member of the Berne Convention, but it has adhered only to the substantive provisions of the Convention, as revised in Rome in 1928 (The "Rome Text") and not to the full series of revisions made over the years. Since the NAFTA required that the Parties give effect to the substantive provisions of the "Paris Text" of 1971, the

(8) *Statutes of Canada* 1993, chap. 15.

Canadian legislation had to be modified in a number of respects to comply with the latest text of the Berne Convention. Although Canada has not yet formally adhered to the latter, it made the required changes under Bill C-115, including:

- redefining what constitutes a "publication" of the work for the purposes of the Act;
- revising the nationality criteria for copyright protection in Canada;
- prescribing copyright terms for works that previously lacked a specific term, and revising existing terms to make them expire at the end of the relevant calendar year, rather than on the relevant anniversary date, as had been the case; and
- modifying the fair dealing exemption to require that the source and the author's name, if given in the source, be mentioned when the work was being used for the purposes of criticism, review or newspaper summary.

Bill C-115 also succeeded in narrowing the scope of the so-called "gramophone" exemption under section 69 of the Act, whose elimination, as mentioned above, had been attempted under Bill C-88.

This exemption, it may be recalled, exempted a wide range of commercial and non-commercial users from paying royalties for playing music in public by means of traditional-style record players, jukeboxes and radio receiving sets. It was unclear, however, whether the exemption also extended to public performances effected by means of television receiving sets. Bill C-115 laid to rest any doubts that may have existed in this regard. It revised the definition of "performance" under section 2 of the Act by stipulating that performances could be effected both by means of a "radio receiving set" and a "television receiving set" - an important distinction that had been lacking in the previous legislation. Since the current "gramophone exemption" refers only to performances effected by means of "radio receiving sets," the revised definition of "performance" made it clear that the exemption would not extend to public performances effected by means of "television receiving sets."

In addition to clarifying the application of the "gramophone" exemption in the foregoing manner, Bill C-115 also narrowed the exemption's scope by eliminating its "gramophone" and "jukebox" component.⁽⁹⁾ As revised, this exemption now applies only to public performances effected by means of "radio receiving sets."

In contrast to the experience with Bill C-88, there was no outcry under Bill C-115 over the proposed narrowing of the "gramophone" exemption, which went by largely unnoticed. A number of the bill's other proposed changes came under fire, however, primarily from creator groups. One example was the proposed 50-year term of protection for all "cinematographs" (i.e., motion pictures). Under the existing legislation, cinematographs that had an "original character" qualified as a "dramatic work" and were accordingly protected for the life of the author plus 50 years after his or her death, whereas those that lacked original character were treated as a series of "photographs" and were thus protected for only 50 years from the date of their making. Bill C-115 sought to change this by prescribing a straight 50-year term of protection for all cinematographs, regardless of artistic character. The film industry, not surprisingly, was outraged. Stressing that such a retrenchment was not warranted in the least under the Berne Convention and would in fact run counter to its spirit, if not its letter, film makers strenuously argued that the status quo be maintained.

In light of the strong representations that were made, the government agreed to retain the two-tiered term of protection for cinematographs. Many other concerns that had been raised were also remedied. In fact, the bulk of the amendments that were made to the bill in committee involved the copyright clauses.

Bill C-115 was passed in the House of Commons on 27 May 1993. It was passed in the Senate and received Royal Assent on 23 June 1993.⁽¹⁰⁾

5. Bill C-93: The Budget Implementation (Government Organization) Act, 1992

Bill C-93, the Budget Implementation (Government Organization) Act, was introduced in the House of Commons on 26 November 1992. Designed to give effect to some of

(9) It should be noted that the "gramophone" exemption under section 69 did not expressly extend to public performances effected by means of "jukeboxes." This component of the exemption was added by judicial interpretation.

(10) *Statutes of Canada* 1993, chap. 44.

the government's cost-cutting measures which had been announced in an earlier budget, this bill, among other things, would have replaced the existing Copyright Board with a new "Intellectual Property Tribunal," which would have had jurisdiction over both copyright and trade-marks matters. The Senate, however, took issue with the bill's proposed merger of the Canada Council and the Social Sciences and Humanities Research Council, and defeated the bill at third reading on 10 June 1993.

6. Bill C-57: The World Trade Agreement Implementation Act

Bill C-57, the World Trade Agreement Implementation Act, was introduced in the House of Commons on 25 October 1994. This bill, among other things, amended the *Copyright Act* to give effect to the copyright provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was negotiated at the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), the predecessor to the World Trade Organization (WTO). The TRIPS Agreement is set out in Annex 1C of the main Agreement.

Many of the copyright obligations arising under the TRIPS Agreement overlapped with those of the NAFTA and consequently had been dealt with under Bill C-115. One example was the requirement under both agreements to create a commercial rental right in relation to computer programs and sound recordings, a requirement which, as discussed earlier, was effected under Bill C-115. It should be noted that the TRIPS Agreement also called for the creation of a commercial rental right in relation to motion pictures (i.e., cinematographs). This requirement, however, was made mandatory only for the WTO countries in which rented films were being copied on such a scale as to materially impair the "reproduction right" of copyright owners (Article 11). Since a rental right for "cinematographs" was not created under Bill C-57, it would seem that, in Canada, rented movies are not being copied to such an extent as to warrant the creation of a statutory commercial rental right for them.

Perhaps the most important new obligation for Canada under the TRIPS Agreement was the requirement under Article 14 to provide limited protection for the performances of performers. Specifically, this Article requires that performers be given the right to prevent unauthorized broadcasts and sound recordings (i.e., "phonographs") of their *live* performances.

This obligation was incorporated under new section 14.01 of the *Copyright Act*, which gives performers the exclusive right to make, or to authorize the making of, an audiotape or a simultaneous broadcast (i.e., a telecommunication to the public) of such of their live performances as are given in a WTO country. This right subsists for a term of 50 years following the calendar year in which the performance takes place and, as with other copyright rights, it may be assigned or transferred by licence. Several exceptions are prescribed under new section 28.02 of the Act. Notably, it would not be an infringement of the performer's right to make an unauthorized audiotape of the performance, or a copy of an unauthorized audiotape of the performance, if the act constituted a "fair dealing" with the work for the purposes of private study, research, criticism, review or newspaper summary. Similarly, it would not be an infringement to make a temporary audiotape of a performance that consisted of a lecture delivered in public, if the audiotape was made for the purposes of publishing a report of the lecture in a newspaper, unless the making of such a report was expressly prohibited at the place where the lecture was given. In cases of infringement, a civil action may be brought for an injunction, damages, accounts or delivery up (new section 34(1.01) *et seq.*) Criminal proceedings may also be brought in relation to infringements of a commercial nature. The punishment on conviction in such cases is the same as that prescribed for other copyright infringements of a commercial nature, namely, a fine of up to \$25,000 or imprisonment for up to six months, or both, in the case of a summary conviction; and a fine of up to \$1 million or imprisonment for up to five years, or both, on conviction on indictment (new section 43.1). Finally, new section 28.03 provides that where, on the later of two dates (i.e., January 1996 or the day on which a country becomes a WTO member), a person had in good faith already incurred expenditures or liabilities in relation to acts that, as of the later date, would have constituted an infringement of the performer's right, compensation would be owing to that person by the owner of the performing right. If the parties could not agree on the amount of the payment, the matter could be referred to the Copyright Board for resolution.

Under new section 29 of the Act, a similar right to compensation was also afforded to other users who, prior to the date upon which a country became a treaty country, had incurred expenditures or liabilities in relation to other protected works, the use of which would have constituted an infringement of the copyright or moral rights respecting the work, had the country in question been a treaty country at the time of use. Again, the Copyright Board was given the

authority to determine the amount of compensation to be paid in such cases, where the parties failed to agree (new section 70.8)

Bill C-57 further amended sections 2 and 5 of the Act to extend protection to the nationals of all WTO countries, as required under Articles 3 and 4 of the TRIPS Agreement, and it repealed the compulsory licences respecting books and serial publications set out under former sections 16 to 26. Although the repeal of these compulsory licences was not explicitly called for under the TRIPS Agreement, the government felt that their elimination was justified on the grounds that they were rarely if ever used; they might be inconsistent with the reproduction right granted under Article 9 of the Berne Convention; and, since they applied only to works by Canadian authors, they might be viewed as an inappropriate discrimination against Canadian nationals.

Bill C-57 was passed by the House of Commons on 30 November 1994 and was referred to the Senate, which passed it without amendments. The bill received Royal Assent on 15 December 1994;⁽¹¹⁾ the copyright amendments under the bill (clauses 56 to 69) were proclaimed in force on 1 January 1996.

C. Phase Two

Under the Mulroney government's initial plan, the adoption of Bill C-60 in 1988 was to complete the first phase of the promised reform and phase two was to deal with the remaining changes. As indicated above, however, six amending bills were introduced in the interim, five of which were passed into law. Notwithstanding these intervening initiatives, a fair amount of ground still remains to be covered under phase two, if the recommendations of the Sub-Committee on the Revision of Copyright are used as a yardstick.

In its 1985 report *A Charter of Rights for Creators*, the Sub-Committee formulated 137 recommendations, 120 of which called for specific changes to be made. Of these, close to 25% were implemented under Bill C-60 and roughly 15% more were dealt with under the other bills. Several more recommendations were implemented outside the copyright regime. As mentioned earlier, a federal program entitled the "public lending right program" was set up in 1986 to compensate Canadian authors, translators, illustrators and the like for the free and unlimited use

(11) *Statutes of Canada* 1994, chap. 47

of their works by the public in Canadian libraries. A separate statutory regime was also enacted in 1990 under Bill C-57 to protect integrated circuit topographies.⁽¹²⁾ When taken together, these initiatives account for approximately one half of the Sub-Committee's recommended changes, thus leaving the other half to be implemented under phase two.

What changes will in fact be made under phase two is an open question, particularly as there has been a change of government in the intervening years. The Sub-Committee's report, however, was extremely well received by the creative community and led to certain expectations among creators that the legislation would be strengthened in their favour. Drawing on the Sub-Committee's recommendations, the remainder of this paper will consider several proposals for change that are still outstanding and that may be dealt with under phase two. The related recommendations made by the former Trudeau government in its 1984 white paper *From Gutenberg to Telidon* will be set out for purposes of comparison. The Mulroney government's response to the Sub-Committee's recommendations will also be outlined.

1. Neighbouring Rights

The term "neighbouring rights" is generally used in reference to the following three categories of works: 1) broadcasts; 2) sound recordings; and 3) the performances of performing artists. Until recently, only sound recordings had some measure of protection under the Act. Broadcasts (as opposed to broadcast *content*) have never been protected subject matter in Canada. The performances of performing artists had also not been protected subject matter. As discussed above, however, limited protection was extended to *live* performances under Bill C-57, the WTO implementation legislation, the relevant provisions of which were proclaimed in force on 1 January 1996.

According to some copyright authorities, the concept of neighbouring rights was developed because certain nations were initially unwilling to make the foregoing works full-fledged members of the copyright family, due in part to their "derivative" nature. That is, instead of being truly "original" works, the neighbouring rights works were viewed as mere offshoots of pre-existing works and thus as not meriting the same level of protection afforded the original works from which they derived. Other authorities have suggested that the reason why a distinction was

(12) *Statutes of Canada* 1990, chap. 37.

drawn between the copyright works and the neighbouring rights works was that, with the notable exception of the performances of performing artists, the "author" of the sound recording or broadcast was typically a corporate entity. As such, there was resistance to providing corporate authors with the same kind of protection as was being extended to the author of a copyright work, who was typically a natural person or natural persons. Whatever the underlying rationale, a separate regime of protection was eventually developed for the neighbouring rights works, which would be parallel to, or "neighbouring on," copyright.

In general terms, the neighbouring rights regime is more limited in scope than copyright. The term of protection afforded the neighbouring rights works is usually shorter than the standard term of "life plus 50" that is generally prescribed for the traditional copyright works. Also, the rights that might be granted to the neighbouring rights works usually comprise only the following three rights: the right to "reproduce the work," to "perform the work in public" and to "communicate the work to the public by telecommunication." These rights, moreover, may be restricted further. Particularly as regards the "public performance" and "telecommunication" rights, the rights holders might be limited to a right of remuneration only; they might not be given the concomitant authority to decide whether to allow or disallow given practices in the first place. This right of payment only, with no overriding control over specific uses, is sometimes referred to as a statutory licence or a compulsory licence.

Another major difference between the two regimes of protection is that the neighbouring rights works are not considered to be covered by the two copyright conventions (i.e., the Berne Convention and the UCC Convention, discussed earlier). In practical terms, this means that if Canada were to enact neighbouring rights, the national treatment rule would not apply automatically. This rule, it may be recalled, imposes non-discriminatory treatment among member states and can therefore have material implications for a country's balance of payments in the copyright sector.

It should be noted that not all jurists agree that the neighbouring rights works are excluded from the application of the copyright conventions. Those who are of this opinion, however, would seem to be in the majority, and in support of their position, they point to the existence of other conventions that were specifically created in relation to some of the neighbouring rights works. The most important of these is the 1961 *International Convention for the Protection*

of Performers, Producers of Phonograms and Broadcasters, otherwise known as the Rome Convention. Canada is not yet a party to this Convention.

Like the copyright conventions, the Rome Convention espouses national treatment. Unlike the former, however, it entitles the signatory states to derogate from this principle in favour of material reciprocity in specified circumstances.

Under the material reciprocity rule, a member state can limit the amount of protection it extends to the nationals of the other member states to the same level of protection that its own nationals receive in these states. The basic premise of material reciprocity, therefore, is to match the benefits extended to those received. In practical terms, this reciprocity-based approach can be beneficial, for it can reduce the amount of royalties that might otherwise have to be channelled abroad under the national treatment rule.

Canada and the U.S., for example, do not currently grant a performing right to the producers of sound recordings. If Canada were to do so and extended the right to foreign nationals on the basis of material reciprocity only, no royalties would have to be paid to American record producers whose works were performed in Canada, since the U.S. does not protect such performances at present and, hence, would not be in a position to reciprocate. If the U.S. were eventually to grant such a right, however, Canada would then become liable and would have to pay the requisite royalties. Naturally, if Canada opted to protect such performances on the basis of national treatment, royalties would be owing to the American record producers irrespective of whether or not similar protection was afforded in the U.S.

Material reciprocity can therefore lead to savings. The extent of the savings, however, depends largely on whether or not the neighbouring rights works of foreign origin that are used in Canada are protected in their home country.

With these principles in mind, the enactment of neighbouring rights for the three categories of works above-noted will now be examined more closely.

a. Sound Recordings

As mentioned above, until recently only sound recordings were protected to some extent under the *Copyright Act*. Historically, however, they enjoyed greater protection than they do now. Under the Act of 1921, these works were assimilated to "musical, literary or dramatic

"works" and, as such, enjoyed the same rights and protections afforded the "traditional" copyright works.

A retrenchment occurred some 20 years ago, however, when the record producers decided to capitalize on their rights. As the copyright owners of musical works had done some 40 years earlier, record producers formed a collective in the late 1960s to administer the "public performance" right and the "broadcast" right (since changed to the "telecommunication" right) in relation to their sound recordings. This move triggered an outcry within the broadcasting industry. Already obliged to pay royalties to the copyright owners of the musical works in their programming, broadcasters vigorously opposed the prospect of having to compensate a second layer of rights holders for the use of recorded music. Much heated debate ensued between the two groups. Eventually, Parliament resolved the conflict in favour of the broadcasters: it passed amending legislation in 1971 that abrogated all but the "reproduction right" in relation to sound recordings.

Since 1971, therefore, sound recordings, although still assimilated to "musical, literary or dramatic works" under existing section 5(3) of the Act, have been restricted to a "reproduction right" only. While the protection afforded this category of work was expanded under Bill C-115 (the NAFTA implementation legislation) to include a "publication right" and a commercial "rental right" (section 5(4)), the ground lost under the 1971 amendment was never recovered.

Record producers are intent on having the full range of rights reinstated for sound recordings, notably the "public performance right" and the "telecommunication right;" this would entitle them to a royalty payment when their recordings were played in public, whether by means of radio, television, sound system, etc. At present, only composers and lyricists receive royalties when their music is played in public - a situation that record producers have long denounced.

The reinstatement of the performance and telecommunication rights for sound recordings has gained even greater importance in recent years, as record sales - the traditional source of revenue for record producers - have been on the decline. Record producers are therefore anxious to see the full rights restored for sound recordings, as this would broaden their revenue base and thus bolster the financial well-being of their industry. In all events, they argue that those

who play sound recordings in public should have to pay for this use, particularly commercial users like radio broadcasters whose programming relies heavily on recorded music.

In its 1984 White Paper *From Gutenberg to Telidon*, the Trudeau government rejected reinstating the full regime of copyright rights for sound recordings, principally on economic grounds. Pointing out that the vast majority of records manufactured in Canada were from master recordings made outside the country, it concluded that reinstating the performing and broadcast rights for sound recordings would result in increased royalty outflows to compensate foreign record producers. It also argued that reciprocal benefits would not accrue to Canadian record producers, since many other countries had not enacted similar rights in their home jurisdiction. (*Gutenberg*, p. 21)

The Sub-Committee took a different position. In its 1985 report *A Charter of Rights for Creators*, the majority stressed that sound recordings were just as creative as other works that were fully protected under the Act - films, for example (i.e., "cinematographs"). Stating that it would be inconsistent to deny full protection to the former while according it to the latter, the majority of the Sub-Committee recommended that the full regime of protection should be reinstated for sound recordings. In order to limit the amount of royalties flowing abroad, however, it recommended that the performing and telecommunication rights should be extended only to those foreign copyright owners whose country extended similar benefits to Canadian nationals (*Charter*, p. 49 to 51). In other words, the Sub-Committee opted for material reciprocity over national treatment.

In a dissenting opinion, the New Democratic Party member of the Sub-Committee, although not specifically opposed to granting full protection for sound recordings, had serious misgivings about recognizing any new rights under the Act without knowing how much it might cost. Noting that, with some types of works, as much as 90% of the royalties collected in Canada might be channelled abroad, the member urged that cost estimates be made before any new rights were created, including the neighbouring rights (*Charter*, p. 100).

In its official response, tabled in Parliament on 7 February 1986, the Mulroney government agreed in principle with the majority of the Sub-Committee's recommendations, although it fell short of endorsing its recommendations in full. Stating that sound recordings were different from traditional creative works, the government indicated that sound recordings would

not, as recommended by the Sub-Committee, be granted the full regime of copyright protection, but would instead be protected under the narrower neighbouring rights regime. Without elaborating further, it also indicated that the conditions and mechanisms for extending a performing and telecommunications right to foreign-made recordings "would be defined in the Act."

(Response: Recommendations #64 to 66)

The Mulroney government's official response caused such concern among private radio broadcasters that they mounted a lobbying campaign to oppose the creation of neighbouring rights. Their efforts eventually prompted the House of Commons Standing Committee on Communications and Culture to hold hearings on the issue in the Spring of 1990. The Committee, however, did not follow through by tabling a report on its findings.

Continuing concern over the enactment of neighbouring rights also led the government to commission a study on the financial and economic impacts of the introduction of neighbouring rights for sound recordings on radio broadcasters, record producers and performing artists. Authored by Dr. Arthur Donner and Dr. Fred Lazar, the resulting report, *Neighbouring Rights: A Financial and Economic Analysis*, was released in October 1994 (hereinafter the Donner Report). It made a number of findings, including:

- The average income of musicians and singers in Canada in 1991 was \$13,700, roughly 50% of the average income for all cultural occupations in Canada. Because of their low income, most singers and musicians are forced to take other jobs in order to survive financially.
- While musicians currently negotiate royalties with their record companies, artists who are internationally acclaimed are in a relatively strong bargaining position and are able to negotiate significant royalty payments and advances on royalties. Emerging performers, in contrast, are in a weak bargaining position and are likely to receive little, if any, income in the form of royalties unless their record sales pass the breaking point. Seven out of ten records produced lose money and just two break even.
- Large record companies, especially those that are foreign-controlled, have done consistently well in Canada; the mid-size companies have just now become profitable and the smallest

companies (predominantly Canadian-controlled, with annual revenues below \$100,000) are consistently unprofitable. Canadian-controlled companies play a very important role in supporting Canadian talent. In 1992 and 1993, they produced over three-quarters of new Canadian-content sound recordings.

- In 1993, AM stations in Canada had an aggregate operating loss of \$59 million, while FM stations had an operating profit of \$20 million. Larger stations are likely to be more profitable than the smaller ones and there are material inter-provincial differences.
- In 1993, SOCAN (the collective for music composers, lyricists and publishers) collected about \$77 million in copyright fees on behalf of its members. Of this total, \$65 million was collected in Canada, 35% from radio broadcasters and just over 50% from television broadcasters. Of the \$23 million paid by radio broadcasters, the CBC paid \$1.2 million and the private, commercial radio stations paid \$21.3 million (or 93%). SOCAN received \$12.7 million from affiliated collectives abroad and paid out \$27.1 million to them. SOCAN's administrative costs were about \$16 million. It distributed royalties of \$27 million to Canadian writers and publishers and a further \$5 million to its members abroad. The remainder was added to the fund for future payments.

Noting the relatively poor financial situation of the Canadian radio industry, Canadian performers and Canadian-controlled record companies, the authors of the report stated that if industry structures were to remain largely unchanged, the implementation of a neighbouring rights regime would have only a marginal impact on the further development of the sound recording industry in Canada, even though it would provide an additional source of revenue for performers and record producers. Given the evolution of the Information Highway both at home and abroad, however, and the resulting implications for the distribution of cultural and other content, they observed that the need for a comprehensive system of rights, including neighbouring rights, seemed appropriate. If Canada was to reinforce its sovereignty and culture in the face of the growth of the Information Highway, more Canadian talent would have to be developed and more Canadian sound recordings would have to be produced and made available for the Information

Highway. Since the bulk of the jobs in future would be on the content side of the Information Highway, it would be important for Canada's cultural industries to have the opportunity and the financial resources to prosper and exploit the opportunities that were to come about. Otherwise, if these industries were allowed to wither away, Canada's cultural identity would be at risk, as would be the jobs in these industries.

Recognizing, however, that the enactment of neighbouring rights would entail payments from an industry currently experiencing financial difficulties, the authors stated that a reasonable rate structure would be advisable, which would take into account the radio industry's current financial picture, including its ability to face its own shorter and longer term challenges. In assessing the various neighbouring rights regimes that might be implemented, the authors based their analysis on two different types of music repertoires, the "eligible music repertoire" and the "universal music repertoire."

The "eligible music repertoire" would comprise only those works that were produced and/or performed by the nationals of a Rome Convention country. Only these works would be subject to the prescribed neighbouring rights tariff and only those who produced and/or performed them would be entitled to a royalty payment. The second repertoire, the "universal music repertoire," would comprise all the works contained in a repertoire, whether or not produced and/or performed by the nationals of a Rome Convention country. All the works in this repertoire would be subject to the prescribed tariff. The payment of royalties, however, would be made only to the producers and/or performers that were from a Rome Convention country, and the remainder of the fees collected would be placed in a fund to promote new production.

After examining 32 different scenarios for each of the eligible and universal repertoires, the authors recommended that, if a neighbouring rights regime were to be implemented, it should contain the following features.

- Only the eligible (and not the universal) repertoire of works should be subject to a neighbouring rights levy. This would minimize the possibility that neighbouring rights in Canada could act as a trade irritant with countries whose music repertoires would not be entitled to any reciprocal payments and would lessen the financial burdens on the private radio broadcasters.

- A single average value for the proportion of total airtime on all private, commercial radio stations accounted for by the eligible repertoire should be used in setting the royalty payments for each station in Canada.
- An exemption to the full tariff, possibly a fixed fee between \$25 and \$100, should be offered to radio broadcasters with advertising revenues below a certain threshold.
- The neighbouring rights regime should be implemented in two stages to lessen the adjustment burden for radio broadcasters; to reduce the likelihood that SOCAN's members might be denied additional rate increases by the Copyright Board because of the costs imposed upon the radio broadcasters by neighbouring rights; and eventually to generate higher revenues for performers and producers.
- In the initial stage, a low threshold for the rate exemption and a low tariff rate should be selected - a threshold of \$500,000 and a tariff rate between 1 and 2%.
- In the second stage, two or three years after the initial distribution of neighbouring rights' revenues, both the threshold and the tariff rate should be increased - possibly to \$1 million and a rate between 2 and 3%.
- The tariff regime should be applied to the aggregate advertising revenues of multi-station groups rather than individual stations. This should not create any administrative problems since all the necessary information is currently available to the Copyright Board. Furthermore, this would shift most of the cost on to the large multi-station groups and increase the revenues that could be generated.
- Neighbouring rights should apply retroactively to all eligible music recorded since 1961. Radio stations, however, need not be made to pay for any of the years prior to the one in which the legislation was passed.

Should neighbouring rights or full copyright be extended to sound recordings under phase two, continued opposition from the radio broadcasting industry can be expected. Due to audience fragmentation and other factors, this industry has argued that many of its members are already hardpressed to make ends meet and simply could not afford the added royalty costs that increased protection for sound recordings would entail. Other users of recorded music, such as the television broadcasters, cable operators and specialty channels, are also likely to oppose the creation of a "telecommunications right" for sound recordings, as their royalty payments would also increase.

Apart from the users who would become liable under the "telecommunication" right, a variety of other users of recorded music would also be liable under the "public performance" right, if granted. The range of users liable under this right would be even greater if the remainder of the so-called "gramophone" exemption under section 69 were repealed under phase two.

As mentioned earlier in the discussion on Bills C-88 and C-115, the so-called "gramophone" exemption exempted a wide range of commercial and non-commercial users from paying royalties for playing music in public by means of traditional-style record players, jukeboxes, radio receiving sets and possibly television receiving sets. Although the proposed elimination of this exemption failed under Bill C-88, a partial repeal was achieved under Bill C-115, which eliminated the "jukebox" and "gramophone" component of the exemption. By redefining the term "performance," it also made clear that the exemption would apply only to public performances effected by means of "radio receiving sets" and not by means of "television receiving sets."

Should phase two grant sound recordings a public performance right and eliminate the remaining component of the "gramophone" exemption (i.e., public performances by means of radio receiving sets), the users who are currently exempted under section 69 are likely to be doubly concerned, since their position would change radically overnight from one of royalty-free use of broadcast programming to one of double payment, that is, a payment to the copyright owners of the sound recording and a payment to the copyright owners of the music comprised in the recording.

The hospitality industry is one example of a user sector that would be adversely affected if such amendments were made. At present, restaurateurs, tavern owners and similar commercial users can provide radio programming to their patrons free of charge. If neighbouring rights were enacted and the remainder of the gramophone exemption were also repealed, these users would become liable to pay two sets of royalties for the continued use of the broadcast programming on their premises.

These and other users of broadcast programming, who would become liable under the "public performance" right, are therefore also likely to join broadcasters in opposing the creation of neighbouring rights.

Creators, in turn, may express their support, although composers and lyricists may provide only qualified support. As the only creative participants in the production of recorded music to have a performing and telecommunication rights under the current legislation, composers and lyricists may agree in principle with the creation of neighbourings rights, but they may have reservations if these rights were implemented at their expense. Such could be the case, if, in implementing neighbouring rights, the existing "royalty pie" were simply carved up into smaller pieces to accommodate the newcomers. Conversely, if the "royalty pie" were to be enlarged commensurately, composers and lyricists might still be concerned if they thought that their future earnings might grow at a slower rate of return than if they alone had been entitled to collect royalties.

b. Performers' Performances

Unlike sound recordings, the performances of performers had never been protected subject matter in Canada until Bill C-57 was passed. As discussed above, this bill granted performers the exclusive right to make, or to authorize the making of, an audiotape or a simultaneous broadcast (i.e., a telecommunication to the public) of their live performances given in a WTO country. Even with Bill C-57, however, actors, singers, musicians, dancers and other performing artists are still at a disadvantage. They have no statutory rights over their pre-recorded performances; nor are they entitled to be paid royalties when their recorded performances are disseminated to the public.

A singing artist like Céline Dion, for example, would now be able, by virtue of Bill C-57, to take action if an illicit audio recording was made of one of her live concerts and the "bootleg" copies were subsequently sold to the public - possibly in competition with the authorized version. Miss Dion is still not entitled under the Act, however, to be paid royalties when her recorded songs and videos are played on the radio or television, at a discothèque or any other public place. As a mere "performer" of music, she has no right to performing royalties. Only if she wrote her own material would she be entitled to a performing royalty - and this would be in her capacity as a songwriter. But as the mere performer of music written by someone else, she is not entitled to a statute-mandated performing royalty. Nor are any other performing artists whose recorded performances may be played in public, be they the "stars" who are featured in a hit production or the musicians who perform with a rock band or an orchestra.

As the only creative members of the entertainment industry to have long been neglected under the Act, performers have consistently urged that their contribution be recognized and adequately protected by statute. In their view, it is fundamentally unfair and inequitable that songwriters, playwrights, film makers, choreographers, etc. should have statutory rights in relation to their work, whereas they, the most visible participants in the production process, should have none or very few. Pointing out that the artistic and intellectual input of each participant contributes to the success or failure of a work, they state that the creative input of performers is no less deserving of protection than the input of the other participants.

Granting protection to performers' performances is equally important, since it would allow performers to exercise more effective control over the use of their recorded performances and to obtain certain remuneration for such uses. At present, performers only have contractual rights with respect to their lawfully made recorded performances, that is, the rights they acquired by contract. If the terms of their contract are not honoured, however, enforcement can be a problem. Some actors, for example, have been unable to collect the residual payments owed to them under the terms of their contract for the re-use of their recorded performances, for example, television re-runs. This can happen where a third party has acquired the rights over the production, but has not assumed all the obligations under the original contract to pay the residual fees. In such cases, the aggrieved actor is generally precluded from suing the successor owner, as there is no contractual relationship between them upon which to base the action. Suing the original

producer may also be of little or no avail, since it is not uncommon in the industry for a judgment-proof shell corporation to be set up for the production of each work. Therefore, even if an action is brought against the original producer, there may be insufficient assets to cover any judgment award that might be handed down. For these and other reasons, enforcement of contractual rights has proven difficult.

If greater protection were to be afforded to performances under the Act, the problems of control and enforcement would largely be obviated. Extending protection to these works has, however, been resisted in the past on a variety of grounds, not least of which is defining which performances should be protected subject matter. With some productions, a large number of performers might be involved. Should the performances of all participants be protected in such cases, or should the rights be granted only to the lead performers? What about orchestras? Should all the musicians in an orchestra have a right to decide if and when their recorded music might be broadcast to the public, or should the maestro alone have the right to decide? What if the various performers cannot agree on how their rights should be exercised? Would the public be denied access to the work in such cases? What about the rights of the copyright owners of the underlying works that are performed? Would their ability to exploit their works be frustrated by the performing artists who might be unable to agree on how to market their recordings?

Apart from the practical difficulty of deciding which performances should be protected, the cost factor has also been a major concern. If performances were protected under the Act, an additional layer of rights holders would be added, thus increasing the costs of using the works in question. Furthermore, should protection be extended to foreign nationals, either on the basis of national treatment or, more probably, on the basis of material reciprocity, a further outflow of royalties might be triggered.

In its 1984 white paper *From Gutenberg to Telidon*, the Trudeau government decided against protecting performers' performances on the ground that it would be "difficult to envisage a practical system permitting use of recorded performances if every performer in a performance could exert an individual copyright claim." Noting that granting rights in this manner would require users to obtain the authorization of every performer for each re-use of a performance, the government concluded that such matters should be handled by private negotiation and not by statute. In answer to the plight of performers whose performances might be recorded

without permission, however, the government indicated that it would make it an offence under the Act for anyone to make an unauthorized recording of a performance for commercial gain or to use such unauthorized recordings for commercial gain. Apart from creating this offence, however, the Trudeau government was not prepared to grant performers any statutory rights in relation to their performances (*Gutenberg*, p. 12). This approach, it should be noted, is a variation of the right that was granted to performers under Bill C-57: the right to authorize and, hence, to restrain the making of illicit audiotapes and broadcasts of live performances by means of a civil action or criminal prosecution.

The majority of the Sub-Committee took a different view. Underscoring the problems of enforcing contractual rights and listing the various uses of recorded performances that would not be covered by contract in all events, the Sub-Committee reiterated that, as a matter of principle, all creators should be protected against unauthorized uses of their intellectual property. Being of the opinion that a performer was just as much a creator as was the producer of a film or sound recording, and that it was "inequitable to protect some creative works and not others, based on artificial distinctions that betrayed value judgments as to the creative merits of certain works," the Sub-Committee concluded that performers' performances should be protected subject matter. It accordingly recommended that performances should be protected for a period of at least 20 years under "the necessary regime of protection," although it failed to specify which rights should be included under this regime. It also recommended that performers should be the first owners of the copyright in their performances and that the performances of foreign nationals should be protected on the basis of material reciprocity. The Sub-Committee sidestepped, however, the question of what should be done in cases where the performers could not agree on the re-uses of their recorded performances. Stating that it was not in a position to evaluate the relative merits of the various options at hand, such as granting performers a right of remuneration only in relation to the re-use of their performances, rather than an absolute veto, it recommended that this issue be studied further (*Charter*, p. 53 to 57).

The Sub-Committee's recommendations, however, were not made unanimously. As mentioned earlier in the discussion on sound recordings, a dissenting member opposed the creation of any new rights until adequate cost studies had been done (*Charter*, p. 100).

In its official response, the Mulroney government indicated that it agreed in principle with the Sub-Committee's recommendations. It stated that, as with sound recordings, performances would be assigned to a different category from traditional creative works, and that the rights granted to performers would be defined at a later date, as would the mechanisms for extending these rights to foreign nationals. The government disagreed, however, that in all cases performers should have first copyright in their performances. In situations of employment, it felt that the standard rule should apply; that is, the employer, rather than the performer/employee, should have first copyright, subject to any agreement to the contrary. (*Response: Recommendations #71 to 74*).

As discussed in the previous section, the 1994 Donner study suggested that it would be appropriate to introduce neighbouring rights in Canada, in view of the advent of the Information Highway. It should be stressed, however, that this study was limited to an assessment of the impact that granting neighbouring rights to *sound recordings* and *recording artists* might have on *radio* broadcasters. It did not consider the broader question of granting neighbouring rights to the performances of performers in all media of communication, notably films and television. This issue was examined in a 1994 report entitled *The Economic Impact of Neighbouring Rights in Audio-visual Works*, which was prepared for the Department of Canadian Heritage by the NGL Nordicity Group Ltd.

The authors of this report observed that, by reason of the collective agreements that had been negotiated within the industry, the majority of performers in Canada were already entitled to be paid for the re-use of their fixed performances, since their contracts typically contained clauses respecting "buy outs," "residuals" and "royalties." With a "buy out," the program producer agrees to "buy out" in advance a performer's performing rights for a specified period (usually five or seven years). The payment of "residuals" is called for when a program is used beyond the declared use and no prepayment options have been exercised. "Royalties" are to be paid when the producer sells rights to a distributor or another user.

Recognizing that performers were not always paid the residuals and royalties owing to them and that enforcing their contracts could be a problem, for the purposes of their

study the authors formulated a neighbouring rights regime that was largely based on existing practices within the industry; it comprised the following elements:

- performers would have the right to authorize or prohibit the use of their performances in audio-visual works, thus covering the fixation of their performance, its reproduction, public performance and telecommunication to the public;
- the foregoing rights would not cease once the performer had consented to appear in an audio-visual work;⁽¹³⁾
- the current rights holder (generally the producer or the distributor) would assume all contractual obligations, including residuals/royalties payments to performers;
- the rights would not apply retroactively; and
- there would be no moral rights for performances.

Pointing out that their calculations were based on an independent examination of the best available data from the three major unions of performers, and underscoring the difficulties of identifying all possible losses of revenue, the authors of the report estimated that, according to two methods of calculation, performers sustained residual/royalty losses of between \$0.3 million and \$0.6 million per year through the unauthorized uses of their performances. The authors concluded:

The Rome Convention is often considered a “milestone” against which protection for performers’ performances is judged. In the Canadian film/video industry, however, collective bargaining between performers’ unions and producers are the framework in which performers earn their revenues. The minimal provisions set

(13) This element was added to counter Article 19 of the Rome Convention which allows member states to deprive performers of the protection afforded to them under the Convention once they have consented to the incorporation of their performance in a visual or audiovisual work.

out in the Rome Convention would not correspond to the remuneration scheme and the reuses for which performers are paid according to their collective agreements. Therefore, we have gone beyond the Rome Convention minima in our understanding of neighbouring rights in Canada.

At the same time, the formulation of neighbouring rights provided in this study takes into account the fact that Canadian performers have a mechanism for the payment of the use and reuse of their filmed performances, through collective bargaining. The neighbouring right, as we have presented it, is a continuation of the collective bargaining system which has been in place for decades, and which performers and producers alike seem to accept. Therefore, while it is unlikely to cause any major change in the way the industry operates, the neighbouring right would "codify" the rights performers have in their performances. The amount of money at stake is a relatively small part of the production industry's revenues, but individual performers could find the residual/royalties that they are owed significant, in terms of their individual earnings.⁽¹⁴⁾

If the cost of granting statutory protection to the performances of performers were indeed as small as suggested in the Nordicity study, the proposal might be well received. It is difficult, however, to imagine that such would be the case, even though the proposal purports to go no further than codifying existing contractual practices within the industry.

One possible area of concern with the Nordicity proposal is that it would not limit performers to a right of remuneration only with respect to the performance and telecommunication of their performances to the public; it would also grant them the separate right to authorize or prohibit such uses. There might be opposition to this component, if it were enacted. Film and program producers in particular might argue that control over their works could effectively be undermined if performers were also given a say on how these works should be exploited. Broadcasters and other users of recorded material might also be concerned, since they might be required to deal with an additional layer of rights holders to obtain the requisite copyright clearances. The Nordicity proposal requirement that the

(14) NGL Nordicity Group Ltd., *The Economic Impact of Neighbouring Rights in Audiovisual Works*. Final Report. Prepared for the Department of Canadian Heritage, October 1994, p. 45.

producers or the distributors be held responsible for paying the residuals and royalties owing to the performers might also come under criticism. Producers and distributors might not want to assume this financial and administrative liability for the full life of the performers' rights (a 20-year term of protection for performers is the usual recommended minimum term), especially if they were required to pay the performers whether or not they themselves were paid by the users for the performances in question. The producers of audiovisual material are not at present fully exercising their rights in relation to the "performance" of their works in public; that is, they are not generally seeking compensation from the many commercial and non-commercial establishments that might "perform" their works "in public" (e.g., taverns, clubs, schools, etc.). In view of this, the fact that they might be held responsible for paying performers for such public performances, as suggested in the Nordicity proposal, might be problematic. These "public performances" appear not to have been considered in the Nordicity study. They are, however, part and parcel of the performing right that performers would like to see enacted in their favour. If such a right is proposed for performers in the forthcoming legislation, there is likely to be far stronger opposition to it than was implied in the Nordicity study.

c. Broadcasts

Of the neighbouring rights works, broadcasts are the only category of work never to have been protected subject matter in Canada. It is important to understand, however, that the works comprised in the broadcast (i.e., music, films, plays, etc.) may themselves be copyright.

Much of the controversy that might have arisen in relation to protecting broadcasts was largely dispelled by the creation in 1988 of a "retransmission" right under Bill C-2 (i.e., the Canada-U.S. free trade implementation legislation). As mentioned earlier, this right, which now forms part of the "telecommunication" right under section 3(1)(f) of the Act, was enacted for the purpose of imposing liability on cable operators who, until then, had been able to retransmit broadcast programming without paying a cent for the programming in question.

In order to put a stop to this "free ride," the Keyes/Brunet report of 1977 recommended that a "retransmission" right be granted to broadcasts.⁽¹⁵⁾ The perceived benefits of this approach were two-fold. First, the cable operators would henceforth have to pay for the broadcasting programming they retransmitted, which was considered only fair under the circumstances. Second, by vesting the retransmission right in the broadcasts themselves, rather than in the works comprised in the broadcast, the national treatment requirement under the Berne Convention and the UCC Convention would not have to be observed, as broadcasts were not considered to be protected subject matter under these Conventions. Thus, by granting the retransmission right to Canadian broadcasts only, none of the royalties paid by the cable operators would have to be channelled abroad to compensate the copyright owners of the foreign programming comprised in the retransmissions, as would have been the case had the retransmission right been vested in the broadcast works themselves. Under the Keyes/Brunet recommendation, all retransmission fees collected in Canada would have remained in Canada for the benefit of Canadians.

This patently protectionist approach found little support, however, and a retransmission right was eventually created in 1988 under Bill C-2 in favour of the works embodied in the broadcasts, and not the broadcasts directly.

Bill C-2 also resolved another important broadcast-related issue: the lack of copyright protection for certain programs that were broadcast "live." At the time, certain live broadcasts lacked protection because the material they contained had not been "fixed" in material form prior to their being transmitted.⁽¹⁶⁾ A sporting event, such as a hockey or baseball game, is one example of programming that might have been unprotected, if it had not been fixed (i.e., recorded) prior to the transmission. In answer to this particular problem, Bill C-2 amended the Act to provide that works that were communicated to the public by telecommunication would be "fixed" for the purposes of the Act, if fixed simultaneously with the communication. In other words, protection would arise if the live event in question was simultaneously recorded at the time of its communication to the public. Since it is standard practice within the industry to make a

(15) Canada, Department of Consumer and Corporate Affairs. *Copyright in Canada, Proposals for a Revision of the Law*. Minister of Supply and Service, 1977, p. 106-107.

(16) While the requirement for "fixation" is not explicit under the Act, the courts have ruled that fixation is a prerequisite to protection, for without it proving the work's existence would be difficult.

simultaneous recording of live events, protection could thus be readily ensured for this type of programming.

These important changes notwithstanding, the question still remains whether broadcasts *per se* should be protected subject matter; that is, whether the "program-carrying signals" should be protected in their own right, independently of the underlying material that is transmitted.

The Trudeau government thought not. Noting in its 1984 white paper that copyright subsisted in the bulk of the material that was broadcast, it argued that protecting the broadcast signals separately would add an unnecessary layer of proprietary rights to already-protected material. It also felt that granting protection to broadcasts could complicate the exploitation of material and add to the negotiating costs of both copyright owners and users. For these and other reasons, it decided against extending separate protection to broadcasts. (*Gutenberg*, p. 12)

The Sub-Committee disagreed. Pointing out that sound recordings were protected independently of the musical works they embodied and that, in some jurisdictions, published editions were also protected independently of the literary works they embodied, the Sub-Committee stated that it had difficulty seeing why similar protection should not be extended to broadcasts. In its view, there was as much creative input in arranging a broadcast (or a "broadcast day" as it is referred to by broadcasters), as there was in arranging other types of compilations, such as a street directory. It concluded that "compilations in the nature of a broadcast" should be protected subject matter and that the protection extended should encompass the following rights: a right of reproduction; a right of transmission; a right to authorize each of the foregoing rights; and a right of retransmission, which would be limited to a right of remuneration only, and not a right to allow or disallow the retransmission in the first place. It further recommended that broadcasts should be protected for a period of 25 years and that the protection should be extended to foreign broadcasts on the basis of material reciprocity (*Charter*, p. 57 to 59).

One Sub-Committee member dissented. Stating that the creative effort that went into organizing a "broadcast day" could not be compared with the creative input of playwrights, composers or producers and that the analogy with the street directory showed just how weak the

rationale was for protecting broadcasts, the dissenting member disagreed that separate protection should be extended to broadcasts. In her view, the practical consequences of doing so would be serious, as composers, writers and other creators would have to compete with broadcasting corporations for scarce royalty dollars (*Charter*, p. 100).

The Mulroney government expressed agreement in principle with the majority's recommendations. It indicated that broadcasts would be assigned to a separate category of protection, along with sound recordings and performers' performances, and that the conditions and mechanisms for extending the rights to foreign broadcasts would be defined in the Act. The Mulroney government did not, however, specify which rights would be extended to broadcasts. (*Response: Recommendations #75 to 78*)

If protection were extended to the "broadcast day," few users would likely be directly affected. Cable operators who retransmit the "broadcast day" in its entirety would obviously be liable, as would those who retransmit by other means, such as by satellite. These users are therefore likely to oppose granting protection to broadcasts as, again, they would be obliged to pay an additional layer of rights holders for their retransmitting activity.

If, contrary to the Sub-Committee's recommendation, broadcasters were granted a retransmission right that was not limited to a right of remuneration only, but that would also encompass the right to authorize the retransmission of their signals, problems could arise. Under current broadcasting regulations, cable operators and certain satellite services are required to carry specified signals. Thus, should they ever be denied permission to retransmit a "must carry signal," they would be placed in an untenable position: they could either decide to retransmit the signal in question and contravene the broadcaster's right, or they could decide against retransmitting the signal and contravene the regulations.

Given this potential for conflict, it is unlikely that broadcasters would be granted more than a right of remuneration in relation to the retransmission of their signals, especially when one considers that the initial retransmission right created in 1988 in favour of the underlying works was itself limited to a right of remuneration only. Should the unlikely outcome occur, however, strong protests could be expected from the cable and satellite industries.

Extending protection to the broadcast day might also be resisted by the creative community. Some creators might agree with the dissenting Sub-Committee member that arranging

or assembling the broadcast day is insufficiently creative to warrant statutory protection. On a more practical level, they might be concerned that their royalty revenues would be adversely affected, since protecting broadcasts separately would add another layer of rights holders entitled to claim their fair share of royalties. If broadcasters were also given control over the use of their signals, creators might be doubly concerned, as they might fear that their own exploitation rights would be thereby jeopardized.

2. Exemptions

As mentioned previously, a number of user groups were highly critical of Bill C-60 because it did not revise the copyright exemptions⁽¹⁷⁾ at the same time as it set the statutory foundation for the collective administration of copyright through "licensing bodies." In fact, the concerns expressed by some user groups were so forcefully argued that the Senate initially passed an amendment that would have suspended for one year the proclamation of the provisions respecting licensing bodies in the hopes that phase two and the revised exemptions would be brought down in the interim. This amendment was subsequently withdrawn, however, due largely to assurances by the sponsoring Minister that phase two would likely be ready for tabling in a matter of months.

Phase two is still outstanding, however, as are the revised exemptions. Users and user groups are predictably anxious to see what exemptions are in store for them. Copyright owners are no less anxious, for they have a vested interest in ensuring that their copyrights are not effectively undermined by over-broad exemptions.

Many of the existing exemptions date back to the original Act of 1921. They were drafted before the technological revolution really took hold and accordingly fail to address many practices that today are commonplace, for example, photocopying topical articles for distribution in class or taping television programs for viewing at a more convenient time. Whether these and other widespread practices should be exempted under the Act is open to debate. The fact remains, however, that technology has vastly facilitated the appropriation of protected material and, in the

(17) Technically speaking, the copyright exemptions set out at sections 27 and 28 of the Act are not "exemptions" but are "defences" to claims of infringement. Nevertheless, the more convenient term "exemption" will be used throughout this paper.

process, has turned a good number of otherwise law-abiding citizens into copyright offenders, whether they realize it or not.

Generally speaking, copyright owners are likely to oppose all but the narrowest of exemptions. They want to have as much control over the use of their material as is reasonably possible. The ability to be remunerated for such uses is an important consideration, but it is not the only one. For many copyright owners, it is equally important that they have the authority to determine the terms and conditions under which their works may be utilized by others. Thus, if preferential treatment is warranted in particular cases, many copyright owners would prefer to make that determination themselves - whether personally or by means of their collectives - than have it imposed upon them by law.

Users, in turn, generally want ready access to the protected material at the lowest possible cost or, preferably for some, at no cost. As statutory exemptions are the best means of achieving this end, users are interested in having the broadest possible exemptions enacted in their favour.

The benefits of being exempted can be significant. First, the users are spared the time and expense of having to locate the rightful copyright owners in order to obtain the necessary copyright clearances. Second, they need not pay any royalties for using the material in question, since exempted uses are cost-free uses.

To be sure, the task of obtaining copyright clearances is being facilitated by collectives which, increasingly, are being formed to administer various sectors of copyright activity. The fact that more collectives are emerging, however, may be of little or no benefit to some users. To begin with, there is no statutory obligation for copyright owners to form a collective. Consequently, there may be some sectors of copyright activity that are not administered collectively. Nor is there a statutory obligation for copyright owners to become members of a collective, once one has been established; thus, a collective operating in a given sector may therefore not be as representative of its sector as might be desirable, particularly if it has failed to enlist the copyright owners whose works are most in demand. A collective's effectiveness may also be limited if, under the terms of its agreement with the copyright owners, it does not have the authority to permit or disallow particular uses for which clearances might commonly be sought.

For these and other reasons, collectives may be unable to provide users with the kind of "one-stop shopping" service that would be optimal. Even if such service were available, users might still be dissatisfied, since obtaining clearances from a collective usually involves the payment of a fee - a fee that many users will likely argue they can ill-afford.

Given the cost, and the fact that ready access might not be a reality in all cases, users are likely to view collectives as a poor substitute for one or more statutory exemptions in their favour. Obviously not all users can hope to be exempted; however, there are some instances where granting an exemption would seem warranted.

One instance is where a user is required by law to carry out a copyright-related activity, but which, if carried out without prior authorization from the relevant copyright owner or owners, would constitute an infringement of copyright. Section 27 of the *Copyright Act* currently exempts certain activities that are mandated under specified laws, namely, the *Cultural Property Export and Import Act*, the *Access to Information Act*, the *Privacy Act* and the *National Archives Act* (section 27(2)(h) to 27(2)(k)). There are, however, other activities that are mandated by statute, but that are not explicitly exempted under the Act. Given the dilemma that might arise for users in such cases, granting an exemption with respect to all statute-mandated activities would seem reasonable. This is also the type of exemption that is least likely to be opposed by the copyright owners.

A more controversial issue is whether exemptions should be granted to specific categories of users who on public policy grounds may have been given special consideration in the past or may be deserving of special consideration in future. Educational, religious and charitable institutions, public libraries, archives and the disabled are examples of groups that have commonly benefitted from one or more exemptions, whether in Canada or abroad. These groups, and other groups that believe they should have special consideration, are likely to claim or renew their claim for preferential treatment under the forthcoming legislation.

In support of their position, these groups may point to the special status enjoyed by their counterparts in other jurisdictions, and seek parity with them. This would ensure a more equal playing field among similarly situated occupational groups. In particular, it would ensure that Canadian users were not paying royalties for the use of materials that their counterparts abroad were getting free of charge by reason of an exemption in the other jurisdiction.

It may be recalled that, by virtue of the national treatment rule under the Berne Convention and the Universal Copyright Convention, Canadians users, unless exempted, are liable to pay royalties to both Canadian and foreign copyright owners for the use of materials protected under the Conventions. Conversely, the users in other jurisdictions, if exempted, would not be subject to such payments. As discussed earlier, the national treatment rule prohibits discrimination among member states. Consequently, whatever copyright protection is conferred in Canada for the benefit of Canadian copyright owners must also be extended to the nationals of the other member states. This obligation to treat all eligible nationals on an equal footing exists, moreover, regardless of whether or not a similar level of protection has been prescribed in the other member states.

Since rights and liabilities, and hence the obligation to pay royalties, can differ from one jurisdiction to the next, certain user groups may therefore have concerns if phase two does not provide them with exemptions that are comparable to those enacted in other jurisdictions, particularly those that have strong copyright ties with Canada. Of the western industrialized nations, the U.S. perhaps best fits this description. It is Canada's foremost supplier of copyright material, and its exemptions would appear to rank among the broadest in the western industrialized world. In order to ensure an equal playing field, some Canadian user groups may therefore ask that measures similar to the American exemptions be enacted in this country.

While requests for special consideration are likely to be made, it is questionable whether phase two will be as accommodating as some user groups might like. The trend in recent years has been to grant exemptions only where there are compelling reasons to do so, and not because particular user groups might be deserving of preferential treatment because of who they are or what they do.

In terms of balancing the interests of creators and users, collectives are increasingly being viewed as the option of choice. The Sub-Committee favoured the use of collectives over the grant of exemptions. In answer to requests from the educational sector for special consideration, the Sub-Committee justified its position in the following terms, at page 70 of its report:

The Sub-Committee has already stated that copyright is the legal recognition of the property rights of creators in their works, and that property carries with it the notion that the rights attaching to it should not be limited unless there is a demonstrated public policy reason to do so. Applying these principles leads the Sub-Committee to the

conclusion that the needs of education should not override the rights of creators. If the needs of education justified limitations to rights, then teachers and caretakers should not be paid. Nor should the utilities, such as water or hydro, used by schools be paid for. If our legal system were to require creators to forego payment for the benefit of education, then all the other participants in the system should also be required, by law, to forego payment.

On a broader level the Sub-Committee viewed the collective exercise of copyright and the issuance of blanket licences as an answer to the needs of educators. The solution, it stated, was not to provide access without payment, but to recommend the only practical method of licensing and payment available. That method is the formation of collectives and the issuance of blanket licences.

If the principles enunciated by the Sub-Committee are shared by the current government, there likely will be few exemptions under phase two. Users, however, might not accept defeat willingly. As mentioned above, they are likely to view collectives as a poor substitute for exemptions and may therefore resist any proposal that falls short of their expectations.

Should it become clear, however, that exemptions will be granted only in limited circumstances, certain user groups may ask, in the alternative, that provision be made under the Act entitling them to a preferential royalty rate, as was done for the benefit of small cable systems when the "retransmission" right (i.e., telecommunications to the public) was created in 1988 under Bill C-2, the Canada-U.S. free trade implementation bill.⁽¹⁸⁾ Drawing on this precedent, some user groups who fail to obtain the desired exemptions, particularly those whose ability to pay might be limited, may ask that a special rate be prescribed in their case. This approach, it may be recalled, was also the one recommended by the Donner report with respect to the enactment of neighbouring rights.

Certain user groups may also seek some form of statutory protection that would limit or negate their liability in specified circumstances, for example, when they were unable to obtain copyright clearances from a collective, because none had been established to administer that

(18) The previous government mandated that a preferential royalty rate be set in the case of small cable systems, due in part to the high costs of providing cable service to small and isolated Canadian communities. This measure, which is set out under section 70.64 of the Act, stipulates that the Copyright Board, in establishing the manner of determining the relevant royalty rates for cable, must ensure that there is a preferential rate for small retransmission systems.

particular sector of copyright activity. It should be stressed in this regard that not all sectors of copyright activity need be administered collectively. Granting the movie rights in relation to a best-selling novel, for example, is not the kind of undertaking necessitating the services of a collective. The parties involved in such a transaction may be relatively few and readily identifiable, and large sums of money are often at stake. Dealing directly with the copyright owner or owners in such cases would seem preferable. Seeking and granting authorizations in relation to ubiquitous photocopying and taping practices, however, or the public performance and broadcasting of music, may be an entirely different matter. In such cases, innumerable users are typically involved, so that it is virtually impossible for copyright owners acting alone to exploit and enforce their rights effectively. Conversely, there may be any number of copyright owners having an interest in the works being copied or performed, thus placing a formidable burden on users to obtain the necessary clearances in order lawfully to use the works in question.

Collectives, in short, may be desirable and indeed essential in some cases. In others, they may be completely unnecessary. As regards those sectors of copyright activity that arguably should be administered by a collective but which are not, the users may accordingly want some form of statutory protection against infringement actions. Protection may also be requested to cover situations where collectives are operating, but, for whatever reason, are unable to provide the sought-after clearances, for example, where the collective does not represent the copyright owners whose works are in demand.

A variety of measures could be considered to provide users with some form of protection in cases where the collective regime proved inadequate. Activities that were not administered collectively, but that arguably should be, might, for example, be deemed non-infringing uses until such time as a collective was established that was able to provide the necessary clearances. Where a collective had been established, but did not represent all copyright owners within its particular sphere of activity, limits could be placed (perhaps by statute) on the amount of damages that the unrepresented copyright owners could claim in an infringement action. Alternatively, the amount could be equal to the amount of royalties the copyright owner would have been entitled to receive had he or she been a member of the collective.

While some users might insist on having their liability limited in certain specified cases, copyright owners might well oppose any measure that would place restrictions on their right

to take action. However, if, as the Sub-Committee recommended, the formation of collectives and their issuing of blanket licences is to be preferred over granting free access to copyright material, it might be argued that strong measures were warranted to encourage copyright owners to form collectives, where needed, or to join existing ones, and thus ensure the viability of such a scheme.

Exemptions, in short, are but one of several options that might be of benefit to users. Other measures, such as statute-mandated preferential royalty rates and limits on liability, might also be considered in attempting to strike a fair balance between the interests of copyright owners and users.

On balance, the former Liberal government and the Sub-Committee were not too far apart in terms of the kind of exemptions they felt should be enacted. Except in one material respect, they both favoured relatively narrow exemptions. The sole exception concerned the fair dealing exemption. The former Liberal government would have broadened the current exemption by making its application more flexible, while the Sub-Committee would have restricted it further. This exemption will now be considered. The recommendations in relation to exempting the educational sector will then be canvassed.

a. Fair Dealing

Prior to the changes made under Bill C-115 (the NAFTA implementation legislation), the fair dealing exemption, set out at section 27(2) of the Act, stipulated that "any fair dealing with any work" would not constitute a copyright infringement, if the work was used "for the purposes of private study, research, criticism, review or newspaper summary." Under the NAFTA amendments, this provision was modified to require that, in cases where a work was used for the purpose of "criticism, review or newspaper summary" (but not private study or research), the source and the author's name, if given in the source, be mentioned in order for the use to qualify as a fair dealing.

The NAFTA changes notwithstanding, none of the exemption's other perceived deficiencies were corrected. One long-standing criticism has been that fair dealing for the purposes of "newspaper summaries" is too narrow in scope, as it applies only to the print media and not to others, notably the electronic media. Another widely shared concern is that because the Act does not define what is meant by a "fair dealing," there has been considerable uncertainty as to what

qualifies as a fair dealing and what does not. Based on the few court cases that have considered this exemption, there is reason to believe that its scope is quite limited.

Acknowledging that the lack of a statutory definition for fair dealing had, to some extent, led to confusion and misunderstanding, the Trudeau government proposed an entirely different measure in its 1984 white paper. It recommended that the fair dealing exemption be replaced by a "fair use" exemption, which would be defined under the Act and which would be complemented by a prioritized list of factors that the courts would have to consider in determining whether or not a particular use was a "fair use" and, hence, an allowable use. The revised exemption, moreover, would apply to all protected works that had generally been made available to the public, regardless or whether or not they had been published in the traditional sense. Specifically, the government proposed to define "fair use" as a use that did not conflict with the normal exploitation of the work or subject matter and which did not unreasonably prejudice the legitimate interests of the copyright owner. The following three factors were, in turn, proposed for the court's consideration:

- the impact of the use on the copyright owner's economic reward;
- the type of work involved and its purpose; and
- the amount or extent of the taking. (*Gutenberg*, p. 39 and 40)

Unlike the existing "fair dealing" measure, which can be claimed for only one of the listed purposes, the Trudeau government's proposed "fair use" exemption would not have been tied to any specific purpose. Rather, its focus would have been primarily, though not exclusively, on the economic interests of the copyright owners. By eliminating the specified-purpose requirement, the proposed "fair use" exemption would likely have allowed more uses of protected material than are allowed under the existing fair dealing measure.

The Sub-Committee rejected the "fair use" proposal. In its view, adopting such a measure would have constituted a substantial departure from the present law. Noting that "fair use" was an American concept and that the concomitant "fair use" exemption in the U.S. had given rise to much litigation, the Sub-Committee pointed out that the current "fair dealing" exemption had worked well and had given rise to few court challenges, either in Canada or in the other

Commonwealth jurisdictions that had adopted a similar provision. For these and other reasons, it concluded that the existing measure should be retained, subject to several small though important changes. It added that fair dealing should not be relied upon by schools and libraries to solve their "reprography" (i.e., photocopying) problems. The solution to those problems, it stated, lay in the formation of collectives and the negotiation of blanket licences.

In recommending that the fair dealing exemption be retained, the Sub-Committee expressly opposed defining the term under the Act on the ground that essential flexibility regarding the measure's application would thereby be sacrificed. The Sub-Committee also opposed providing a prioritized list of factors for the court's consideration because this again would sacrifice essential flexibility. It did not object to providing a discretionary list of factors, however, provided they were illustrative only and not prioritized. The Sub-Committee further recommended that fair dealing for the purpose of "research" be restricted to "private research," and that fair dealing for the purpose of "newspaper summary" be expanded to encompass all methods of news reporting. Finally, it recommended that the fair dealing exemption should apply to published works only and not unpublished works (*Charter*, p. 63 to 66).

In its 1986 response, the Mulroney government agreed in principle with the foregoing recommendations. It indicated, however, that the fair dealing exemption for research purposes, whether private or otherwise, would apply to any unpublished works that were deposited with archival or conservation institutions. It also stated that it would examine the possible impact of these recommendations on research practices in general. (*Response: Recommendations #82 to 86*)

b. Educational Institutions

There are only three exemptions that are specific to educational institutions under the Act. Other measures, such as the fair dealing exemption, above-noted, or the exemption under section 27(2)(f), which allows a reasonable extract from any published work to be read or recited in public, may also be of benefit to the educational sector. These measures, however, are of general application and therefore apply to all categories of users. The exemptions that are specific to the educational sector allow the following activities to be carried out:

- short passages of copyright material may be included in a collection that is published for school use, provided the following conditions are met: the collection mainly comprises non-copyright material; it is intended for the use of schools and must be so described in the title and in any advertisements issued by the publisher; the selected passages are from published literary works that are not themselves published for the use of schools; not more than two passages from works by the same author are published by the same publisher within for a period of five years; and the source from which the passages are taken is acknowledged (section 27(2)(d));
- churches, colleges or schools (as well as religious, charitable or fraternal organizations) may perform musical works in public without paying royalties, provided the performance is in furtherance of a religious, educational or charitable object. It should be noted that this measure exempts only the payment of royalties for such performances; it does not eliminate the separate requirement that the copyright owners' permission first be obtained before the performance takes place (section 27(3)); and
- copies of any work, the importation of which might otherwise constitute an infringement, may be imported for the use of an "institution of learning" or public library, provided the work has not yet been printed or made in Canada (section 45(3)(c)).

Educators are of course significant users of copyright material. A number of them may also be regular copyright infringers, as some of the things they do, whether routinely or infrequently, are not expressly exempted under the Act, for example, making multiple copies of protected material for distribution in class; taping televised programs for viewing and discussion purposes in class; and preparing and selling compilations of selected copyright materials for use in class.

Given the delays incurred in tabling the phase two amendments, two Private Members bills were introduced in past Parliaments to alleviate the plight of educators needing to use protected material.

Bill S-8 was introduced in the Senate and was given first reading on 21 November 1989. This bill would have enabled recognized educational institutions to use any published

copyright material in the prescribed manner in all cases where a licence could not be obtained from a collective on reasonable terms and conditions.

The second bill, Bill C-317, was given first reading in the House of Commons on 15 June 1990. This bill would have replaced the existing "fair dealing" exemption with a "fair use" measure. As proposed, the fair use measure would have allowed all copyright works that were not administered by a collective to be used for selected purposes, notably, teaching, criticism, comment and research, provided the use in question was a "fair use," as determined according to a non-exhaustive list of factors. In addition, works reproduced in multiple copies for teaching purposes would automatically qualify as a fair use. Finally, broadcast works that were copyright but that were not administered by a collective could be taped and retained for a maximum of 120 days without infringing copyright. All copies, however, would have to be destroyed after that time, unless they were made for instruction purposes and represented less than 10% of the entire work.

Bill S-8 was studied by the Senate Standing Committee on Banking, Trade and Commerce, but did not receive third reading. Bill C-317, in turn, was eventually withdrawn, though its subject matter was referred to the House of Commons Standing Committee on Communications and Culture. This Committee, however, held no hearings on the subject. Eventually, both proposals died on the Order Paper.

Even though these initiatives did not bear fruit, the plight of educators may have improved somewhat in recent years, since more collectives have been formed to administer various sectors of copyright activity, notably, the "reproduction" right in relation to printed published materials.

At present, two collectives allow printed material to be photocopied or otherwise duplicated. The Union des écrivaines et des écrivains québécois (UnEQ), which operates exclusively in the province of Quebec, has had an agreement with the Quebec Department of Education for a number of years, which enables the CEGEPs, primary and secondary schools in the province to copy the works in UnEQ's repertoire, to the extent specified under the agreement. The second collective, the Canadian Reprography Collective, also known as CANCOPY, was established in 1988 and operates in the rest of Canada. CANCOPY signed its first blanket licence with the Ontario Ministry of Education in 1991, and has since negotiated licences for all publicly funded schools in the provinces of Manitoba, Saskatchewan and Alberta. It has also negotiated

licences covering most community colleges in Canada, and all universities, except for those in Quebec, which are handled by UnEQ.

While blanket licencing for the reproduction of printed materials may soon become a reality in schools, colleges and universities across the country, there may be other important sectors of copyright activity for which blanket licences may not be available. The audio-visual sector is one example of a sector which, as yet, does not appear to provide a comprehensive "one-stop shopping" service. Consequently, teachers wanting to tape a topical TV program for later viewing and discussion purposes in class may be unable to obtain the necessary clearances on time, thus forfeiting that "teachable moment."

As discussed earlier, even if comprehensive blanket licences become available in all relevant areas of copyright activities, users, including educational users, may not be fully satisfied, since many of them are likely to prefer exemptions.

Based on earlier recommendations, it is unlikely that broad exemptions will be enacted for the benefit of the educational sector. The Sub-Committee, it may be recalled, opposed granting exemptions to special categories of users, unless there were compelling reasons to do so. In its view, the answer in most cases lay in the formation of collectives and the negotiation of blanket licences. To a large measure, this position appears to have been shared by the Trudeau government, which also recommended the adoption of fairly narrow exemptions, subject, however, to one material difference: under the Trudeau government's proposed "fair use" exemption, far more uses would arguably have been allowed than under the Sub-Committee's more restrictive "fair dealing" measure.

Apart from what would be allowed as a "fair use" or allowed under any of the other exemptions of general application, the Trudeau government recommended the enactment of three new exemptions specific to the educational sector. First, it recommended that the existing exemption allowing schools to perform music in public for educational purposes without paying royalties be replaced by a broader exemption that would apply to non-profit educational institutions only. This would have allowed all copyright material (e.g., plays, choreography, music, literary readings, etc.) to be performed in public for teaching purposes, provided the works were performed by the students or instructors. The Trudeau government further recommended that a limited exemption be enacted in relation to educational broadcasts. This exemption would have

been subject to the same limitations that were proposed with respect to the above-noted public performance exemption (i.e., non-profit educational institutions, teaching purposes, broadcasts by students or instructors); it would also have applied only where the production, origination and receipt of the programs transmitted were confined to the educational institution. Finally, it was recommended that an exemption be enacted that would have allowed any work to be reproduced for examination purposes, whether as part of the questions asked in an examination or as part of the answers to such questions. (*Gutenberg*, p. 41 to 43)

In addition to creating these new measures, the Trudeau government also recommended that the existing exemption at section 45(3)(c) respecting imports be retained. As stated above, this provision allows copies of any work to be imported for use in "institutions of learning and public libraries," if the work has not yet been printed or made in Canada (*Gutenberg*, p. 25). On the other hand, the Trudeau government did not clearly indicate whether the current exemption under section 28(2)(d) regarding the inclusion of copyright material in educational publications should be retained. Given that government's position on the reproduction of works in general, there is reason to believe that this exemption would have been eliminated.

The Sub-Committee recommended the adoption of the same three exemptions proposed by the Trudeau government, that is, that teachers and students, in the normal course of teaching activities, be allowed to perform a work in public, and to transmit and retransmit a work within the confines of a single educational institution. It also recommended that an exception be enacted that would allow works to be reproduced as part of questions to be asked, or answered, in an examination (*Charter*, p. 70 and 71). Although it recommended that importation protection should be maintained for all protected works, the Sub-Committee did not specifically discuss whether the related exemption respecting "institutions of learning" should be retained. Nor did it discuss the current exemption allowing the inclusion of copyright material in educational publications. In light of its position on exemptions in general, the Sub-Committee probably intended that both measures should be repealed.

The Mulroney government simply indicated that it accepted the Sub-Committee's specific recommendations regarding public performances, broadcasts and examination questions (*Response*: Recommendations #90 and 91).

Due to the concerns of educators over Bill C-60, a consultative committee of interested parties was established while the bill was still before Parliament, to make recommendations on the type of exemptions that should be enacted for the educational sector. Consensus was reached on a number of issues, and in a document released in June 1988, entitled *Amended Educational Provisions* (unpublished), the consultative committee made ten recommendations for change, which ranged from the inclusion in the legislation of a limited damages clause for the use of works that were not represented by a collective, to a specific exemption that would have allowed selected radio and television programs to be taped and played in class in furtherance of the "teachable moment." Subsequent to this agreement, the then Minister of Communications indicated that the phase two legislation would not contain any of the specific exemptions recommended by the consultative committee. Instead, all uses by the educational sector would be subject to payment, but only if a collective was operating in the field. If a given sector of copyright activity was not administered collectively, educational users would be provided with free access to the unrepresented works. Conversely, as regards those sectors of copyright activity that were administered collectively, provision would be made entitling educational users to a preferential rate with respect to those uses that the consultative committee recommended be exempt uses.

It is unclear at this point which, if any exemptions, will in fact be afforded the educational sector under phase two.

CONCLUSION

In a news release issued on 22 December 1994, the two Ministers responsible for copyright (the Minister of Canadian Heritage and the Minister of Industry) indicated that legislation amending the *Copyright Act* would be tabled as soon as possible in 1995. This projected tabling date, like the many others before it, was not met. There are, however, strong indications that the government is now ready to proceed. Extensive consultations have taken place in recent months and years on the proposed revisions and, although interested parties may still disagree on the changes that ought to be made, few are likely to be taken by surprise.

This paper has examined several issues that are likely to be dealt with in the forthcoming legislation, namely the enactment of neighbouring rights and changes to the existing

fair dealing exemption and the exemptions for the educational sector. Many more issues, however, remain unresolved. For example, should other categories of users, such as public libraries, archives, the handicapped, religious organizations, charitable organizations, the government, Parliament and the legislatures, be given special status under the legislation? Should the remainder of the "gramophone" exemption under section 69(2) of the Act be repealed? Should the current exemption respecting certain agricultural fairs and exhibitions be repealed? Should Crown copyright be retained, or should government works be in the public domain? Should there be copyright in the judgments of the courts and tribunals? Should exclusive book distribution agreements be protected under the Act in an effort to stem the flow of so-called "parallel" imports?⁽¹⁹⁾ Should measures be enacted to compensate copyright owners for home-taping practices? Should the legislation be concerned with the ability of users to pay royalties? Should users, in specified cases, be guaranteed lawful access to works that are not administered by a collective? Should the legislation contain measures to encourage copyright owners to form or become members of a collective?

Whether the forthcoming legislation will comprise "phase two" is an open question. The current government is not obliged to act on its predecessor's commitment to complete the reform process in a second and last series of revisions. It may opt instead to proceed on an incremental basis, and decide to address only some of the issues that past studies have identified as ripe for reform.

Ten years have also elapsed since the last comprehensive study on copyright reform was undertaken. Things have changed. Most notably, the Information Highway is now with us, a phenomenon that was not common currency a decade ago, but which today is revolutionizing the information industry.

In the Speech from the Throne of 14 January 1994, the government made a commitment to develop a Canadian strategy for the Information Highway. This commitment led to the formation in March 1994 of the Information Highway Advisory Council and, in April 1994, Industry Canada released a discussion paper entitled "*The Canadian Information Highway: Building Canada's Information and Communications Infrastructure*." This document identified

(19) The term "parallel imports" refers to copies of a work that are lawfully produced in another jurisdiction (i.e., with the copyright owner's consent), but that are subsequently brought into Canada and that compete with the domestically available copies - in possible contravention of a copyright owner's exclusive territorial rights or, more likely, of the exclusive distribution rights that a Canadian agent may have acquired by contract with the copyright owner in relation to the Canadian market.

copyright as a critical issue affecting the development of new products and services for Canada's Information Highway.

In recognition of the important and complex role of copyright on the Information Highway, Industry Canada retained the services of NGL Nordicity Group Ltd. to provide information and analysis that would identify copyright policy issues, options and benefits to creators, industry, business users and consumers in order to assist the government in addressing issues critical to the development of new media on the information highway.

The NGL Nordicity Group Ltd. issued its final report, *Study on New Media and Copyright*, on June 30 1994. Stating that existing copyright policy and mechanisms were adequate for non-digital media, the authors of the report observed that there were areas that could be amended or that could be studied further for the new media.⁽²⁰⁾ Four options were presented for consideration, none of which, the authors indicated, should be viewed as mutually exclusive. These options consisted of:

- ensuring copyright protection for the new media exclusively by contract;
- making small policy changes and larger changes to the administration to ensure that copyright remained relevant to the new media;
- revamping the copyright framework to make the new media a new category of work or revise the Act more fundamentally to address not specific types of works, but just "works" or "creations"; and
- creating a distinct regime of protection (a *sui generis* right) for the new media works.

(20) The term "new media" was defined in the report as consisting of hybrids of print and/or electronic media in which the content can include text, sound, graphics, and audio-visual programming. The new media can encompass enrichment of traditional media (e.g., digital audio broadcasting), combinations of previously separate media (e.g., multimedia) and the creation of entirely new media (e.g., hypermedia).

The authors concluded that copyright was inextricably linked to the economics and structure of the Information Highway and that, in general terms, copyright and related policies and copyright mechanisms could greatly affect the development of content and the distribution of revenues derived from content. For these reasons, they recommended that copyright should be brought into a broader policy-making arena, for example, the Information Highway Advisory Council.⁽²¹⁾

The establishment in March 1994 of the Information Highway Advisory Council (the Council) was a further initiative taken by the Department of Industry to address the challenges of the Information Highway. Comprising 29 members from such divergent fields as telecommunications, broadcasting and information technology industries and institutions, the artistic, creative and educational communities, and consumer and labour organizations, the Council was asked to study the issues and make recommendations to the government on a strategy to build a Canadian Information Highway.

To assist it in this task, the Council formed a Copyright SubCommittee in August 1994, the mandate of which was to identify the specific issues and make recommendations on the role of copyright in the context of the Information Highway. Comprising members with expertise in copyright from both the legal and business communities, the SubCommittee issued a preliminary report in December 1994. Its final report, *Copyright and the Information Highway*, was issued in March 1995.

Overall, the SubCommittee concluded that the current *Copyright Act* provided sufficient protection for new and existing works, including multimedia works, that were created or distributed in a digital medium. The SubCommittee also concluded that, for the most part, the current copyright legislative and policy framework was sufficiently flexible to provide the means of effectively enforcing copyright on the Information Highway, while at the same time providing users with reasonable access to protected works. However, it felt that several amendments should be made to the Act and it made a number of specific recommendations for change.

(21) NGL Nordicity Group Ltd., *Study on New Media and Copyright, Final Report*, Minister of Supply and Services Canada, 1994, p. *iiii* and *iv*.

The recommendations of the SubCommittee were considered by the Council, which submitted its final report, *Connection Community Content, the Challenge of the Information Highway*, to the Minister of Industry in September 1995.

The Council observed that since the *Copyright Act* had come into force in 1924, copyright had been an essential lever to encourage creativity and ensure adequate compensation for creators. In this way, it stated, copyright had both benefited Canadian creators and proven important to the realization of Canadian cultural sovereignty and national identity. Noting, however, that the new technologies - primarily digitization and interaction - had provoked wide debate on how copyright should be applied and enforced on the Information Highway, it recognized that the potential for piracy, or for the unauthorized use and reproduction of protected works and the consequent economic repercussions, was a cause for concern to creators and producers. In answer to these concerns, the Council felt that users, service providers and distributors of protected works on the Information Highway needed to have a fuller understanding of the nature and extent of copyright liability, and that streamlined procedures for rights clearances had to be developed.

The Council agreed with the Copyright SubCommittee that the *Copyright Act* provided sufficient protection for new and existing works created or distributed in a digital medium, and that the current legislative and policy framework was sufficiently flexible to accommodate the interests of creators and users. It also agreed that some changes were needed under the Act, and it endorsed most, if not all, of the SubCommittee's recommended changes, including the following.

- If needed to resolve any certainty concerning the scope of the "telecommunications" right, the Act should be amended to provide clearly that a communication offered to the public by means of telecommunication is subject to the authorization of the copyright owner, even where such communication is made on-demand to separate individual users.
- The owners and operators of bulletin boards on the Information Highway should be liable for infringement. A defence mechanism should be provided, however, for those instances where it

could be demonstrated that they did not have actual or constructive knowledge of the infringing or offensive material and where they acted reasonably to limit potential abuse.

- The language of the Act should be tightened to impede or prohibit hidden and unauthorized acts of commercial rental in the case of computer programs and sound recordings.
- The moral right of integrity should be retained under the Act, although the presumption of prejudice that applies to paintings, sculptures and engravings under section 28.2 should be revised to bring it back to its original intent; that is, the presumption should apply only where the *original* of such works has been distorted, mutilated or otherwise modified.
- Crown copyright should be maintained, although, as a matter of policy, federal government information and data should, as a rule, be in the public domain. Where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs incurred to reproduce the work.
- The act of “browsing” a work in a digital environment should be considered a reproduction of the work, and it should be left to the copyright owner to determine whether and when browsing should be permitted on the Information Highway. The copyright owners should identify what part of their work is appropriate for browsing. Further, the Act should be amended to provide a definition of the terms “browsing” and “publicly available work.”
- The fair dealing exemption should be clarified. Specific criteria and guidelines as to its scope should be provided in the Act, including explicit clarification that fair dealing applies to the making of an electronic copy of a work and to the storage and transmission of that copy by electronic means.
- Compulsory licensing should not be considered in the marketplace.

- Where it is done for the purposes of infringement, tampering or bypassing of any kind of encryption or copyguards should be made a criminal offence under the Act.
- Provision for statutory damages, based on the U.S. model, should be made under the Act.
- The federal government should assist in the development and standardization of user-acceptable ways to track use of protected works. It should also assist in the development and use of "identifiers" to be included in the distribution of protected works in a digital format to make it easier to trace copyright ownership and unauthorized use of protected materials.
- The federal government should encourage the industry and the creator and user communities to create administrative systems to streamline the clearance of rights respecting the use of works in a digital medium.
- In partnership with industry and the creator and user communities, the federal government should take an active role in launching a public education campaign to better inform users and creators about the use of copyright.⁽²²⁾

The Minister of Industry is in the process of formulating a response to the Council's recommendations, which may be released sometime in April 1996. According to officials at the Industry Department, the forthcoming legislation will not contain any major amendments respecting the Information Highway since more time is needed to consider the recommendations and determine what action should be taken. It seems clear, therefore, that the next bill will not complete the review process. That a "phase three" will be needed now seems a virtual certainty.

(22) Information Highway Advisory Council, *Connection, Community, Content, The Challenge of the Information Highway*, Minister of Supply and Services Canada 1995, p. 112-120.

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